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No. 11748

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM A. CARMICHAEL, District Director,
United States Department of Justice, Immigration
and Naturalization Service, District No. 16,

Appellant,

vs.

JOHN DELANEY,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

FFB - 4 1948

PAUL P. O'BRIEN. CLERK

No. 11748

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Appeal:	
Notice of	54
Statement of Points Upon Which Appellant Intends to Rely on Appeal (Circuit Court).....	105
Stipulation as to Record on.....	56
Stipulation and Order re Original Exhibits.....	55
Certificate of Clerk.....	58
Findings of Fact and Conclusions of Law.....	46
Judgment	52
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	54
Opinion of the Court Granting Writ of Habeas Corpus	16
Petition for a Writ of Habeas Corpus.....	2
Reporter's Transcript of Proceedings.....	59
Petitioner's Exhibits (See Index to Exhibits)	
Respondent's Exhibits (See Index to Exhibits)	
Testimony on Behalf of Petitioner:	
Delaney, John—	
Direct examination	59
Return to Writ of Habeas Corpus.....	7
Exhibit "A." Notice to Deliver, Detain on Board, or to Remove Aliens.....	9

ii.

Page

Statement of Points Upon Which Appellant Intends to Rely on Appeal (Circuit Court).....	105
Stipulation as to Record on Appeal.....	56
Stipulation and Order re Original Exhibits.....	55
Stipulation and Order for Substitution Party Re- spondent	57
Stipulation and Order re Exhibits (Circuit Court).....	106
Traverse to Return to Writ of Habeas Corpus.....	11

iii.

INDEX TO EXHIBITS

Petitioner's Exhibits:

No.	Page
1. Marriage certificate, dated October 22, 1896 (the certificate is dated December 1, 1943, but the date of the marriage is indicated as on October 22, 1896, license No. 88243, issued to M. Delaney and Bridget Whalen, both of Ireland) (In evidence)	60
2. Commission in the United States Maritime Reserve as a lieutenant, issued March 6, 1944, to John Delaney (In Evidence).....	64
3. United States Maritime Service release from active duty (certifying that John Delaney, 4433-00243, has been released from active duty as lieutenant on March 25, 1944) (In Evidence)....	65
4. Card issued by the Captain of the Port at Los Angeles, to John Delaney, on December 27, 1943, indicating citizenship of United States of America (In Evidence).....	66
5. Letter, dated March 2, 1944, from War Shipping Administration, directed to John Delaney, Lieutenant, United States Maritime Service, from enrolling officer, Wilmington, California (In Evidence)	68
6. Certificates issued by the Maritime Service awarding Pacific War Zone Bar, Merchant Marine Combat Bar, Mediterranean Middle East War Zone Bar, and Atlantic War Zone Bar (confirming active service with the United States Merchant Marine in those war areas) (In Evidence)	73

iv.

Petitioner's Exhibits:

No.	Page
7. Continuous service record of John Delaney issued by Bureau of Marine Inspection and Navigation (In Evidence).....	76

Respondent's Exhibits:

A. Certified copy of the crew list covering the departure of vessel Schenectady on June 9, 1944 (For Identification)	97
(In Evidence)	98
B. Record of the hearing before the Board of Special Inquiry held at San Pedro, California (In Evidence)	98

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

JAMES M. CARTER

United States Attorney

RONALD WALKER

ROBERT E. WRIGHT

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif.

For Appellee:

DAVID C. MARCUS

213 Spring and Second Building

Los Angeles 12, Calif. [1*]

In the District Court of the United States
Southern District of California

Central Division

No. 4591-O'C

In the Matter of the Application of

JOHN DELANEY

For a Writ of Habeas Corpus.

PETITION FOR A WRIT OF HABEAS CORPUS

To the Honorable District Court of the United States.

This petition respectfully recites:

I.

That John Delaney, is detained, confined and restrained of his liberty by the Department of Justice, Immigration and Naturalization Service, at Terminal Island, Los Angeles, California.

II.

That said detention, confinement and restraint are illegal and consist of the following: That petitioner herein is a citizen of the United States of America, born on or about the 14th day of November, 1898 at Brooklyn New York, N. Y.

III.

Your petitioners father was Michael Delaney and his mother Bridget Whalen, who were married at Philadelphia, Penn. United States of America, on October 22, 1896 and were issued marriage certificate Number 88343. [2]

IV.

Your petitioner is informed that his mother died at Brooklyn, N. Y. shortly after the birth of your petitioner herein.

V.

That on the 6th day of March, 1944, petitioner was commissioned a Lt. in the United States, Navy, Maritime Service and issued certificate Number 4433-00243 and on the 6th day of June, 1944, petitioner departed from the United States, aboard the U. S. S. Schenectady, for overseas duty, that he served aboard ship in Pacific Combat waters, delivering supplies and transporting troops continuously and away from the Continental United States, from said 6th day of June, 1944 until the return of said ship to the Port of San Pedro on the 20th day of May, 1945 and entered the United States at said Port on said date.

VI.

On the 21st day of May, 1945, your affiant was taken into custody by the Immigration and Naturalization Service and has been continuously detained in custody since said time.

VII.

That your affiant is informed, believes and therefore alleges: That said Immigration and Naturalization Service has detained him and confined him of his liberty for the reason and in the belief that petitioner herein is an alien of the United States and of Irish citizenship and Nationality.

VIII.

Your petitioner further alleges that he registered in 1941 as an American citizen under the Selective Service, Proclamation of the President of the United States and is a member of the Long Beach Board, registered as an American citizen.

IX.

Petitioner further alleges that he was issued certificate Number 601693, by the United States Coast Guard at San Pedro, Califor- [3] nia, dated December 27, 1943, as a citizen of the United States, place of birth designated N. Y. United States of America.

X.

That he has served aboard ships of the United States of America since the year 1917, that he has been a resident of Southern California since the year 19 and was registered in the United States Selective Service Draft for the year 1917.

XI.

That said Immigration and Naturalization Service has on numerous occasions during his incarceration authorized his release on Bond in the sum of five Hundred (\$500.00) Dollars, pending investigation and determination by a board of special inquiry, respecting his entry and citizenship and did on or about the 28th day of June, 1945, permit him in custody of a member of said service to proceed to the offices of the Company with which he was employed at Wilmington, California, to secure sufficient sums from his earnings to deposit said Bond in the

sum of Five Hundred (\$500.00) Dollars. Petitioner herein secured sufficient sums to deposit as a Bond and while in the process of preparation of said Bond capriciously and arbitrarily refused to accept said Bond for his release.

XII.

That John Delaney, is not held by virtue of any complaint indictment, warrant or quarantine law, rule or regulation except as specifically set out and no other application for a Writ has been made on his behalf.

XIII.

Your petitioner has loyally and faithfully served his Country the United States of America as a Lieutenant in the United States Navy Maritime Service. Has been employed aboard Ships of the Maritime Service of the United States on occasions since the year 1917, and during the 1st World War. Has been in actual combat and on duty in the war zones of the Pacific for the past year. That said Immi- [4] gration Service took your affiant in custody the day following his arrival in the United States and has so detained him in custody since said time and have advised him that they intend to continue to keep him in custody until such time as necessary to a complete investigation of his status, claim to citizenship and right to enter requiring communication, inquiry and search in foreign Countries and in different States of the United States, which time is indefinite, uncertain and problematical.

XIV.

That by reason of the foregoing the detention of your affiant is illegal. That he is entitled to a Judicial determination of his United States Citizenship and to be admitted to a reasonable bail pending such inquiry, investigation or Judicial determination.

XV.

That the action of the Immigration Service has been capricious, unfair and arbitrary.

XVI.

That petitioners health is being materially affected by his continued incarceration he has lost a great amount of weight, is very nervous, worried and aggravated and unable to transact, manage or carry on his business and affairs.

Wherefore it is prayed that a Writ of Habeas Corpus, may be granted directed to the Department of Justice Immigration and Naturalization Service, commanding them to have the said John Delaney, before said Court to do and receive what shall then and there be considered by said Court concerning his restraint; that he be restored to his liberty and pending the hearing of said Writ that he be restored to his liberty on reasonable bail.

Dated: This 2nd day of July, 1945.

DAVID C. MARCUS

Attorney for John Delaney

[Endorsed]: Filed Jul. 3, 1945. Edmund L. Smith,
Clerk. [5]

[Title of District Court and Cause]

RETURN TO WRIT OF HABEAS CORPUS

I, Albert Del Guercio, District Director, United States Department of Justice, Immigration and Naturalization Service, Los Angeles, California, District No. 16, Respondent herein, for my return to writ of habeas corpus issued in the above case, state:

I.

That John Delaney, hereinafter referred to as the Petitioner, is not being illegally restrained by me of his liberty but is in my custody under proper and lawful authority.

II.

The Petitioner arrived at the Port of San Pedro, California, on May 20, 1945, from a foreign country as a member of the crew of the vessel "Schenectady" serving in the capacity of Second Assistant Engineer. The crew of the vessel was, upon its arrival, inspected by an Immigrant Inspector of the United States Immigration and Naturalization Service. The Petitioner claimed United States citizenship by birth in Brooklyn, New York. The said [6] Immigrant Inspector was in possession of information that the Petitioner had registered under the Alien Registration Act as an alien, claiming birth in Cork, Ireland, and that he had first arrived in the United States on November 14, 1924. The said Immigrant Inspector on May 20, 1945, in accordance with law, served upon the Master of the vessel "Schenectady" notice to deliver the Petitioner to the office of the Immigration and Naturalization Service at Terminal Island for further examination. A copy of the said notice is attached hereto as a part of this return and marked exhibit "A".

III.

On May 21, 1945, further examination was accorded the Petitioner as provided by law, before a Board of Special Inquiry composed of three duly appointed Immigrant Inspectors, one of whom acted as Chairman. A full stenographic record of the examination before the said Board of Special Inquiry was made as required by law. There is attached hereto as a part of this return and marked exhibit "B" a copy of the stenographic report of the hearing before the Board of Special Inquiry on May 21, 1945 and subsequent dates, consisting of fifty-three pages of transcript and twelve exhibits.

IV.

The hearing before the Board of Special Inquiry is at present in a pending status awaiting the outcome of certain further investigation.

Wherefore, I, Albert Del Guercio, District Director, United States Department of Justice, Immigration and Naturalization Service, District No. 16, pray that said writ of habeas corpus be dismissed and that the Petitioner be remanded to my custody.

ALBERT DEL GURCIO

District Director

United States Department of Justice
Immigration and Naturalization Service
District No. 16 [7]

[Verified.] [8]

Exhibit "A"

Form I-259

(Old 559)

Notice to Deliver, Detain on Board, or Remove Aliens

U. S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

Port of San Pedro, Calif. 5-20, 1945

To the Owner, Agent, Consignee, Master or Officer in
Charge of the SS. Schenectady.
Deconhill Shipping Line.

Pursuant to the provisions of the Acts of February 5,
1917, December 26, 1920, and May 26, 1924, and the
Immigration Regulations issued by the Attorney General
thereunder, you are hereby directed to deliver to

Erase two)	
deliver to)	
detain on board)	Immigration Station
)	†(Place of delivery or detention)
remove to)	Terminal Island

the following-named aliens, with their baggage, your at-
tention being invited to the appropriate sections of the
statutes appearing on the reverse side hereof, and regu-
lations made thereunder:

Name

Status on Vessel

(1st, 2d, 3d, or tourist class passenger; member of the crew; stowaway, etc.)

John Delaney, age 45

2nd Asst. Engineer

Deliver to Immigration Station,
Terminal Island, Calif. for
further examination

By direction of the Immigration and Naturalization
Officer in Charge.

/s/ F. E. Eldridge

U. S. Immigrant Inspector

Receipt of the above notice is hereby acknowledged.
May 20, 1945, at 10:15 AM.

/s/ W. G. Friar

(Signature)

Master

(Title of person signing receipt)

(Over)

16—18927

Copy

[Endorsed]: Filed Jul. 7, 1945. Edmund L. Smith,
Clerk. [9]

[Title of District Court and Cause]

TRAVERSE

Comes now the Petitioner above named John Delaney and traverses the return to Petitioners Writ of Habeas Corpus on file herein and admits, denies and alleges as follows:

On the Return to Writ of Habeas Corpus:

I.

Denies generally and specifically all of the allegations with respect to paragraph I.

II.

Denies that Petitioner arrived at the Port of San Pedro, California on May 20, 1945, from a foreign Country as a member of the crew of the vessel "Schenectady" serving in the capacity of second assistant engineer. Denies that your Petitioner at said time was inspected by an Immigration Inspector of the United States Immigration and Naturalization Service.

III.

On information and belief denies that an Immigration [10] Inspector on May 20, 1945 in accordance with law, served upon the master of the vessel "Schenectady" notice to deliver the petitioner to the Office of the Immigration and Naturalization Service at Terminal Island for further examination.

IV.

Denies that on May 21, 1945, further examination was accorded petitioner as provided by law before a Board of Special Inquiry.

To the Supplemental Return to Writ of Habeas Corpus and With Respect to Exhibit C.—Attached Thereto Petitioner Alleges:

I.

Re-affirms and re-alleges all of the allegations of petitioners petition for Writ of Habeas Corpus.

II.

Alleges that all hearings before the Board of Special Inquiry were erroneous, illegal and in violation of petitioners constitutional rights as guaranteed by the Vth and XIV amendment to the Constitution of the United States, unfair and arbitrary.

III.

That the Findings, Conclusions and order of the Board of Special Inquiry, the Commissioner of Immigration and Naturalization and Board of Immigration Appeals, is not sustained by the evidence; contrary to the evidence and founded upon hearsay ex-parte statements of witnesses not under oath, introduced in evidence without the right of cross-examination, founded upon hearsay, resulting in a miscarriage of lawful and Constitutional Procedure.

IV.

That Petitioner was born in the United States at New York City on the 14th day of November, 1897, to M. Delany and Bridget Whalen, who were married at Philadelphia, Pennsylvania, on the 22nd day of October 1896. Petitioners mother died at childbirth, his father [11] remarried and when petitioner was two years of age went to

Ireland, with his father and stepmother, subsequently when petitioner was about 16 or 17 years of age he returned to the United States. That in the year 1942, petitioner entered the United States Maritime Service and in the year 1943 became a Lieutenant, in the United States Naval Reserve, petitioner served on the U.S.S. *Le Golia*, for 8 months, during the year 1942; aboard the *USAHS Republic* for 6 months during the year 1943. As a Lieutenant in the United States Naval Reserve petitioner was under command and orders from the United States Navy and on or about the 6th day of May 1944, was ordered by his superior officers to ship as a Lieutenant aboard the *S. S. Schenectady* an oil, armed tanker attached to the United States Fleet, in Asiatic Waters, petitioner served aboard said vessel supplying oil to the United States Navy, continuously until the 20th day of May, 1945, when said ship returned to the United States and docked in San Pedro, California. Petitioner entered the United States on said date, remained in Long Beach, California on said 20th day of May, 1945 and resumed his abode at said place on said date and was advised on the 21st day of May, 1945, to report to the Immigration Office at San Pedro. Petitioner took an oath of allegiance to the Armed Forces and the Government of the United States, when inducted as a Lieutenant in the United States Naval Reserve, was engaged in combat on the Marshall Islands and Ulithy engagement, was at all times aboard a United States vessel, under command and orders from the Commander of the Asiatic Fleet, at no time voluntarily departed from the United States, but during all times while in service of the United States Maritime Service and the United States Naval Reserve, was under orders and did ship aboard United States vessels pursuant to such orders and commands.

V.

That by reason of the foregoing the Board of Special Inquiry is barred and denied authority from excluding petitioner from the United States and that such order is without right, illegal, void [12] and erroneous. Petitioner having entered the Continental United States on May 20th, 1945, to resume his permanent residence therein the actions, procedure and process of said Immigration Department in convening a Board of Special Inquiry to debar and exclude petitioner from the Continental United States, was illegal, void and without constitutional and legal authority and established procedure to so do, and said excluding order without authority, illegal, void and without constitutional and jurisdictional authority so to do.

VI.

The following Findings of Fact and Conclusions of Law of the Board of Special Inquiry, affirmed on appeal are not sustained by the evidence, contrary to evidence, and law arbitrary and unfair.

“Findings of Fact: Upon the basis of all the adduced, it is found:

1. That the appellant is an alien, a native of Ireland and a subject of Great Britain;
2. That the appellant has never been lawfully admitted to the United States for permanent residence;
3. That the appellant last arrived in the United States at San Pedro, California, on May 20, 1945, as a member of the crew of the SS ‘Schnectady.’”

“Conclusions of Law: Upon the basis of the foregoing findings of fact, it is concluded:

1. That under Section 13(a) of the Act of May 26, 1924, the appellant is inadmissible to the United States as an immigrant not in possession of [13] an unexpired immigration visa;
2. That under the Passport Act approved May 22, 1918, as amended, and Executive Order No. 8766, the appellant is inadmissible to the United States as an immigrant not in possession of an unexpired passport."

VII.

The legal, proper and authorized procedure was not in excluding proceedings which barred the right of petitioner to representation of counsel after petitioner had at all times served and shipped aboard American vessels of the United States Navy but by deportation proceedings which authorized by constitutional and legal authority the right of petitioner to representation by counsel. The service by petitioner aboard United States Armed vessels of the United States Navy under command and orders of personnel of the United States Navy and his return to the United States on May 20, 1945 did not constitute an entry into the United States, within the meaning of Section 166, Title 8 of the United States Code Annotated.

Wherefore petitioner prays that the Writ of Habeas Corpus be granted and the petitioner discharged.

DAVID C. MARCUS

Attorney for Petitioner [14]

[Verified.] [15]

Received copy of the within traverse this 28 day of Dec., 1946. James M. Carter, U. S. Atty.

[Endorsed]: Filed Dec. 28, 1946. Edmund L. Smith, Clerk. [16]

[Title of District Court and Cause]

OPINION OF THE COURT GRANTING WRIT OF
HABEAS CORPUS

David C. Marcus, of Los Angeles, California, Attorney for the Petitioner;

James M. Carter, United States Attorney, and Robert Wright, Assistant U. S. Attorney, and Bruce G. Barber, Chief, Adjudications Division, U. S. Immigration and Naturalization Service, of Los Angeles, California, for respondent.

J. F. T. O'Connor, District Judge.

Introductory Statement:

John Delaney, also known as John Joseph Delaney, through his counsel, David Marcus, Esq., filed in this court on July 3rd, 1945, his petition for a writ of habeas corpus alleging:

(1) That he was detained, confined and restrained of his liberty, illegally, by the Department of Justice, Immigration [17] and Naturalization Service, at Terminal Island, Los Angeles, California, District No. 16; and

(2) That he was a native-born American citizen born on or about the 14th day of November, 1898, at Brooklyn, New York. The petition for the writ of habeas corpus was granted, and made returnable in this court on July 9th, 1945.

The United States Department of Justice, Immigration and Naturalization Service, Los Angeles, California, District No. 16, respondent herein, through Albert Del Guercio, District Director, filed its return thereto, on July

7th, 1945, denying these allegations, to which there was a traverse, filed by petitioner on December 28th, 1946, to said return, and to a supplemental return filed by respondent on December 20th, 1946. There was a hearing in court thereon, and thereupon the matter was taken under submission on briefs to be filed, which briefs have been filed and duly considered by the court.

Two Issues in Case:

This is an exclusion proceeding, as distinguished from a deportation proceeding(1); and there are just two issues involved herein; namely

(1) When the petitioner, John Delaney, arrived at the Port of San Pedro, California, on May 20th, 1945, from a foreign country, namely Australia and other foreign ports, as a member of the crew of the vessel "Schenectady," a vessel in the Maritime Service of the United States, serving in [18] the capacity of second assistant

(1) Exclusion proceeding: "Any alien seaman who shall land in a port of the United States contrary to the provisions of this subchapter shall be deemed to be unlawfully in the United States, and shall at any time within three years thereafter, upon the warrant of the Secretary of Labor, be taken into custody and brought before a board of special inquiry for examination as to his qualifications for admission to the United States, and if not admitted said alien seaman shall be deported at the expense of the appropriation provided in section 156 of this title (Feb. 5, 1917, c. 29, 34, 39 Stat. 896; May 6, 1924, c. 190, 19, 43 Stat. 165.)

engineer(2) did he, as a matter of law, make an entry (or reentry) into the United States as that word is defined in Sec. 19 (a) of the Immigration Act of February 5th, 1917(3), assuming that he was an alien at that time; and

(2) Was John Delaney at that time an American citizen by *jus soli*, in fact and in law, or an alien immigrant not in possession of a valid immigration visa, as required by the Immigration Act of May 26th, 1924, the Alien Registration Act of 1940, and Executive Order No. 8766.

There is no dispute about the fact that the SS. "Schenectady" went to Australia, the Persian Gulf, New Zea-

(2) The departure crew list on file with the Service covering the departure of the "Schenectady" from the port of Los Angeles, California, on June 9th, 1944, describes the vessel as a tanker "owned and operated by Becon Hill Shipping Company, agents for War Shipping Administration", and that W. G. Friar is master of the said vessel. The crew list further recites that the vessel is bound foreign and lists among the "name of seamen", line 21, "John Delaney, capacity, Second Assistant Engineer." The War Shipping Administration was created by Executive Order of February 7, 1942, No. 9054 (7 F. R. No. 28837, February 10, 1942; pursuant to the Act of June 6, 1941, c. 174, 55 Stat. 242, 50 USCA Appendix, Sec. 1271) and had transferred to it certain functions and duties of the United States Maritime Commission (Gov. Brief page two)

As a second engineer in the American Merchant Marine, John Delaney stated he held a reserve commission as a Lieutenant in the United States Navy (from page 76 of the reopened hearing, dated September 18th, 1946)

(3) Sec. 19 (a) of the Immigration Act of February 5th, 1917, 39 Stat. 889, (8 U. S. C. A., Sec. 115 (a)): *** Any alien who is hereafter sentenced to imprisonment for a term of one year or more because of a conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States *** shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

land, Philippine Islands and the Marshall Islands, and was in Curacao, Dutch West Indies and then went back through the Panama Canal to the Marshall and the Admiralty Islands and Ulithi, Caroline Islands, and returned to San Pedro and arrived therein [19] on May 20th, 1945; and that John Delaney was in battle engagements in the Marshall Islands and in Ulithi. The departure crew list (*supra*) lists John Delaney as a United States citizen and the purpose of the voyage of the SS. "Schenectady" was to supply oil to the United States Navy(4).

John Delaney testified at the hearing on his application for the writ of habeas corpus that, prior to this voyage, he took an oath of allegiance to the United States, in 1943, in joining the United States Maritime Service; that, while in the service of the United States Maritime Service, he was paid by the United States government; that his checks came from the United States Treasurer in Washington, D. C., during his entire service with the United States Maritime Service extending about a year and six months; that he did not make any voluntary trips from the United States; that the United States Coast Guard assigned him to the SS. "Schenectady" as engineer; that the Coast Guard was a part of the United States Navy; that the orders to go to sea came from the United States Coast Guard; and that the penalty for

(4) Lieutenant John Delaney was awarded the Atlantic War Zone Bar, the Mediterranean Middle East War Zone Bar, and the Pacific War Zone bar, confirming active service with the United States Merchant Marine in those war areas; as well as the Merchant Marine Combat Bar confirming active service with the United States Merchant Marine in a ship which was engaged in direct enemy action. (Petitioner's Exhibit No. 6)

refusing to obey orders, in time of war, would be court martial(5).

John Delaney further stated that, when the SS. "Sche-nectady" departed from the United States on June 10th, 1944, he intended to return to the United States, and that he remained [20] on this vessel from June 9th, 1944, to May 20th, 1945. The court understands him to mean that he was not transferred to another vessel in the interim; and, while there is apparently no evidence in the record that John Delaney disembarked at any of these foreign ports, the court will assume that he did at every opportunity, although whether he did, or did not, would be immaterial for the purpose of this opinion, on the authority of U. S. ex rel. Roovers v. Kessler, 90 F. (2d) 327(6).

(5) The court will judicially notice that the functions of the War Shipping Administration were not a part of the powers and authority exercised by the United States Navy. Captain McKinney, Legal Officer, United States Naval Headquarters, Roosevelt Base, Terminal Island, advised that the United States Navy did not, during the present war, direct the departure of vessels operated under the authority of the War Shipping Administration, and that the Navy had no control or supervision over the personnel assigned to such vessels." (From Gov. brief p. 2)

(6) "After having been told by the immigration authorities at New Orleans (according to the testimony of the relator) that he would not alter his status if he shipped on a United States vessel and did not go ashore at any foreign port, he obtained employment as a seaman aboard the American steamship Santa Marta. In the course of the voyage the steamship touched at the foreign ports of Havana, Cuba, Cristobal, Canal Zone, and Puerto Cortez, Honduras. Relator testified that he did not go ashore at any port, and the Government offered no controverting testimony ... The court said:

"We find nothing of substance in any of these points. U. S. ex rel. Claussen v. Day, 279 U. S. 398, 49 S. Ct. 354, 73 L. Ed. 758 and U. S. ex rel. Stapf v. Corsi, 287 U. S. 129, 53 S. Ct. 40, 77 L. Ed. 215, settle it that appellant made a new entry, and that

Upon the return of the SS. "Schenectady" at the port of San Pedro, California, on May 20th, 1945, John Delaney, as a member of the crew(7) had no passport and could not prove [21] his citizenship, American or otherwise, to the satisfaction of the Immigration officers, and he was held for a Board of Special Inquiry to determine his nationality, although John Delaney had certain documentary evidence indicating his American nationality(8).

Exclusion Proceedings:

Although the Government has attached to its Return to Writ of Habeas Corpus exhibit A, which purports to be a copy of a directive to the owner, agent, Master, etc.

his time for remaining in the United States ran from it. Appellant did leave the United States on board a ship; he did on board that ship enter foreign ports and foreign territory; and he did, on board the same ship, reenter the United States. That he did not betake himself ashore is immaterial. United States v. Corsi, *supra*" (Italics supplied.) U. S. ex rel. Roovers v. Kessler, etc., 90 F. (2d) 327 U. S. C. A. 5th Cir., decided June 7th, 1937.

(7) The "Continuous Discharge Book, Department of Commerce, United States of America, No. 233972", in the name of John Delaney, records at page 4, line 2, that Mr. Delaney was engaged on June 6th, 1944, at San Pedro, in the rating of Second Assistant Engineer, showing the description of voyage as foreign, and date and place of discharge, May 23rd, 1945, San Pedro, signed by Master W. G. Friar, (From Gov. brief page 2.)

(8) There was introduced into evidence at the hearing before the court, as Pet. Ex. 2, an identification card issued to John Delaney on March 6th, 1944, by a Lieutenant in the U. S. M. S., showing that John Delaney was a lieutenant in the U. S. Maritime Service, War Shipping Administration Training Organization; as Pet. Ex. 3, a certificate releasing John Delaney from active duty as a lieutenant in the U. S. Maritime Service, on March 25th, 1944, at San Francisco, and placing him in an inactive status in the U. S. Maritime Service; and his Continuous Discharge Book, issued to him by the U. S. Merchant Marine at Los Angeles, California, showing his place of birth New York on November 14th, 1898 (Nationality U. S. A.) etc. Pet. Ex. 7.)

of the SS. "Schenectady" for the delivery of John Delaney to the Immigration Station at Terminal Island for further examination, receipt of which notice is purported to have been acknowledged by the Master, W. G. Friar, at 10:15 A. M., May 20th, 1945, John Delaney gave the court to understand that when the vessel reached San Pedro, California, and docked there on May 20th, 1945, he left the ship and went to his home in Long Beach, California, the same day, and stayed there all night(9); and the next day (May 21st, 1945) when he endeavored to return to the ship, he found it out in the harbor; and that upon [22] calling up the shipping office at San Pedro, where the ship was, he was informed that he was to report to the Immigration Station, that being the following day (May 21st, 1945) after his arrival in the United States at San Pedro, California, giving the court to understand that up to this time he was absolutely unaware of the fact that the Immigration authorities wanted him. On the basis of John Delaney's testimony, he had entered the United States without any interception whatsoever, and, if this be a fact, he certainly must have entered the United States or technically have made a landing. There is no evidence that he tried to avoid his interception, and it would seem to the court that deportation proceedings, rather than exclusion proceedings, would have been the proper proceedings, although the court is not passing on this point in these proceedings. He further stated that he went to the Immigration office while in uniform, and the

(9) Petitioner John Delaney contends that on May 20th, 1945, when said ship returned to the United States and docked in San Pedro, California, petitioner entered the United States and remained in Long Beach that day and all night, and was advised on May 21st, 1945, to report to the Immigration Office at San Pedro, hence that exclusion proceedings are too late.

Immigration official thereupon took him into, and kept him in, custody for six weeks without permitting him to communicate with anyone, until he was finally released on his application for a writ of habeas corpus, which his jailor at first refused to honor.

The Government, notwithstanding the fact that petitioner John Delaney was permitted to leave the vessel and remain at his home over night in Long Beach, California, takes the position that this proceeding is rightfully an exclusion proceeding, rather than a deportation proceeding, for the reason, obvious to the court, that in an exclusion proceeding involving the deportation of an alien for an unlawful entry, the burden is upon the alien to prove his citizenship (U. S. ex rel. Polymeris et al. v. Trudell (1932), 284 U. S. 279); whereas in a deportation proceeding, where citizenship is claimed, the burden of proof is upon the Government to prove alienage (U. S. v. Siug Tuck, et al. (1904), 194 U. S. 161. [23])

The Government, in support of its contention that exclusion proceedings were proper, cites Sec. 15 of the Act of February 5th, 1917, as amended (39 Stat. 885; 8 U. S. C. 151) providing in part as follows:

“Section 15. That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the duty of the proper immigration officials to go or to send competent assistants to the vessel and there inspect all such aliens, or said immigration officials may order a temporary removal of such aliens for examination at a designated time and place, *but such temporary removal shall not be considered a landing . . .*” (Italics supplied.)

citing *U. S. v. Ju Toy*, 25 S. Ct. 644, 646, 198 U. S. 253, and *Nishimura Ekiu v. U. S.*, 12 S. Ct. 336, 339, 142 U. S. 651, 35 L. Ed. 1146, but the court, on the basis of John Delaney's statement, does not believe he is subject to this section; but will hold that exclusion proceedings in this case were proper to determine the questions involved.

Basis for Holding John Delaney for a Board of Special Inquiry:

The action in holding the applicant, John Delaney, for a Board of Special Inquiry was based upon a communication from Perry M. Oliver, Director of Administrative Services, General Office, dated September 25th, 1944(10); this communication being in effect an information sheet containing the data given by John Delaney at the time of his registration under the alien Registration Act of 1940, a copy of which has been made a part of the record of the Board of Special Inquiry, marked Ex. No. 2.

This Board of Special Inquiry denied the application of John Delaney for admission to the United States, and moved that he be excluded, on the grounds that (1) he is an alien immigrant not in possession of an unexpired immigration visa, as required by the Immigration Act of 1924, and the Alien [24] Registration Act of 1940, and Executive Order No. 8766; and (2) is not in possession of a passport or official document in the nature of a pass-

(10) John Delaney of 1761 East Broadway, Long Beach, Los Angeles, California, registered as an alien at Long Beach, California, on December 16, 1940, that he gave his date of birth as November 14, 1897, his place of birth at Cork, Ireland, his citizenship as British, his place of last entry into the United States as Wilmington, North Carolina, date of entry as November 14, 1924, means of entry as "Nehian."

port issued by the Government of the country to which he owes allegiance or other travel document showing his origin and identity as required by the Passport Act of May 22nd, 1918, as amended, and Executive Order No. 8766, informing the applicant that he had a right to appeal from the decision to the Attorney General (Board of Special Inquiry Report, page No. 28).

On January 4th, 1946, the Commissioner entered an order affirming the excluding decision of the Board of Special Inquiry, but the Board of Immigration Appeals ordered the hearing reopened on January 15, 1946, to obtain additional evidence.

On October 9th, 1946, the Board of Immigration Appeals affirmed the Commissioner's decision of October 4th, 1946; and, on November 5th, 1946, the Commissioner recommended that the decision of the Board of Immigration Appeals on October 9th, 1946, be not disturbed.

What Constitutes the Last Date of Entry of John Delaney Into the United States?

The petitioner, John Delaney, of course, takes the position that his last date of entry into the United States was on November 14th, 1924, when he arrived at Wilmington, North Carolina, on the SS. "Nehian"; while the Government contends that his last date of entry was on May 20th, 1945, when he entered the United States at San Pedro, California, on the SS. "Schenectady". The record shows that while John Delaney had previously been in the United States, he returned to the United States aboard the SS. "Nehian", a British ship, arriving at Wilmington, North Carolina, on November 14th, 1924, as a member of the crew, in which his nationality was given as British, his

Race Irish, and his age twenty eight, and the [25] court will assume such entry lawfully.

John Delaney stated that all of his employment, prior to 1924, while ashore in the United States, was mostly in the shipyards in and around New York; and that after his arrival at Wilmington, North Carolina, on November 14th, 1924, on the British SS. "Nehian", and up to the time of his departure from San Pedro, California, on June 10th, 1944, on the SS. "Schenectady", he had not left the United States in the interim for any foreign destination, and had worked in shipyards and laundries. The record is uncontradicted that he remained in this country, engaged in honest labor, was a man of good character, and had never been arrested.

The petitioner, John Delaney, takes the position, assuming that he was an alien at the time of his detention on May 21st, 1945, but not conceding this fact, that his last entry into the United States was on November 14th, 1924, on the British SS. "Nehian"; and that, as a matter of law, his arrival at the port of San Pedro, California, on May 20th, 1945, cannot be considered an entry in these exclusion proceedings under Sec. 19-A of the Immigration Act of February 5th, 1917, 39 Stat. 889 (8 U. S. C. A., Sec. 155(a), *supra*. But with this contention the court, assuming it would be necessary to find that John Delaney was an alien at the time of his last entry, cannot agree.

What Does, and Does Not, Constitute an Entry by an
Alien Into the United States:

Petitioner John Delaney, in the instant proceeding, places great reliance on *Ex parte Kogi Saito*, 18 Fed. (2d) 117 (decided by the District Court, W. D. Washington, N. D., on March 23rd, 1927; and on the case of

Matsutaka v. Carr, District Director of Immigration, 47 F. (2d) 601, CCA, 9th Circuit, decided on February 24th, 1931, to support his contention that he did not make a reentry into the United States at San Pedro, California, [26] on May 20th, 1945, as that word is defined in the statutes and case law under consideration, but the court finds that these two cases are not in point.

Sec. 120.3 of Title 8 of the Code of Federal Regulations provides:

“120.3. Arriving from any foreign port or place defined. ‘Arriving in the United States from any foreign port or place’ means arriving in ‘the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone and the Philippine Islands’, *from any port or place in a foreign country . . .*” (Italics supplied.)

In the Kogi Saito case (*supra*) the Government contended that the petitioner, employed on American vessels sailing in British Columbia waters, reentered the United States on the return of the vessels, *but the record did not disclose that the petitioner had at any time left the vessel upon which he was employed as a cook.* (Italics supplied.) The court, in finding for the petitioner stated: “While departure by an alien from the United States, even though for a brief time, on re-entry, is subject to the Immigration Laws (Lewis v. Frick, 233 U. S. 291, 297, 34 S. Ct. 488, 58 L. Ed. 967; Lapina v. Williams, 232 U. S. 78, 31 S. Ct. 222, 54 L. Ed. 1204); this has no application to a member of a crew on an American ship on foreign waters.”

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In the above case just referred to, it is to be noted that no foreign port was touched.

In *U. S. ex rel. Claussen v. Day*, Commissioner of Immigration, 49 S. Ct. 354, 279 U. S. 398, 73 Law Ed. 758 (decided May 13th, 1929), the Court had for consideration specifically what constituted an entry into the United States under the Immigration Act, and ruled that:

“Section 1 provides that ‘United States’ as used in the Act shall be construed to mean the United States and any waters, territory or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone. An entry into the United States is not effected by embarking on an American vessel in a foreign port. [27] Such a vessel outside the United States whether on the high seas or in foreign waters is not a place included within the United States as defined by the Act.” See *Cunard SS. Co. v. Mellon*, 262 U. S. 100, 122; *Scharrenberg v. Dollar S. S. Co.*, 245 U. S. 122, 127. The word ‘entry’ by its own force implies a coming from outside. The context shows that in order that there be an entry within the meaning of the Act there must be an arrival from some foreign port or place. There is no such entry where one goes to sea on board an American vessel from a port of the United States and returns to the same or another port of this country without having been in any foreign port or place. See Secs. 19, 32, 33, 35.

And it is clear that petitioner departed from the United States on the “*Elisha Atkins*” and that, when he landed at Boston on his return from South American and Cuban ports, he made an entry into the United States within the meaning of the Act.” . . .

(Syllabus 3: In order that there may be an entry within the meaning of the Act, there must be an arrival from some foreign port or place (*id.* 16 F. (2d) affirmed)).

In the case of *Matsutaka v. Carr*, 47 F. (2d) 601, decided by the Circuit Court of Appeals for the 9th Circuit on February 24th, 1931, relied upon by the petitioner, John Delaney, the question for decision was whether an alien seaman who had resided in the United States for a period barring his deportation for an illegal entry was entitled to reenter the United States upon his return from a fishing voyage in foreign waters as a member of the crew of an American fishing vessel. The court said:

“This question was answered in the affirmative by this court in *Weedin v. Banzo Okada*, 2 F. (2d) 321, and that decision has been generally followed by the District Courts of this Circuit. *Ex parte T. Nagata* (D. C.), 11 F. (2d) 178; *Ex parte Kogi Saito* (D. C.), 18 F. (2d) 116.” *The appellant shipped for a voyage from San Diego, Calif., to Mexican waters and return. No foreign port was named, and it is questionable, at least, whether any foreign port or place was in fact entered.* (Italics supplied.)

See also the case of *U. S. ex rel. Stapf v. Corsi*, 287 U. S. 129, decided on November 7th, 1932, which held that the relator's arrival into this country was an entry, notwithstanding he was a member of the crew of an American ship which had made a round trip voyage where he came from a place outside the United States, and from a foreign port or place, where the vessel had docked for two and one-half days, and there was no [28] indication that the alien had gone ashore, within the meaning of the

Immigration laws, citing *United States ex rel, Claussen v. Day*, 279 U. S. 398(11).

In the case of *Taguchi v. Carr, et al.*, decided by the Circuit Court of Appeals for the Ninth Circuit, on December 19th, 1932, 62 F. (2d) 307, which was a habeas corpus case, the appellant had entered into the United States unlawfully at Seattle on August 14th, 1918, and had remained continuously in this country until about July, 1931, when he signed on an American fishing boat at San Pedro, Calif., to engage in fishing on the high seas and in Mexican waters. The court:

“It appears that this vessel proceeded southward along the Mexican coast in the channel between Santa Margarita Island and the mainland for Mexico for the purpose of fishing . . . ‘That while on a fishing trip on this boat and during a heavy storm the fishing boat collided with another and sank off Santa Margarita Island, Lower California, Mexico; that in order to save the petitioner’s life the captain instructed him to land on said island, where he remained until the America tug boat Homer picked up the petitioner and brought him to San Pedro,

(11) The one case that seems to aid the petitioner, *Delaney, is Weedin v. Banzo Okada*, 2 Fed. (2d) 321, a case decided by the Circuit Court of Appeals for the Ninth Circuit on November 24th, 1924, which decision antedates the group of decisions under discussion, and which it would seem has been subsequently overruled by the Ninth Circuit. The Circuit Court at that time took the view that where a Chinaman, a member of the crew, was permitted by the captain to land for a few hours at the port of Sydney that the petitioner had not made a new entry into the United States. The decision in this case evidently hinged on the fact that the Government was dealing with a Chinaman, and that the captain of the vessel would have been under a penalty if he (the captain) had not returned the petitioner to this country.

California, arriving on or about the 27th day of September, 1931'.

"The Board of Special Inquiry at San Pedro, California, after hearing, denied appellant admission to the United States and held him subject to deportation. The specific grounds upon which appellant was denied admission are that 'he is an immigrant alien not having in his possession an unexpired immigration visa as required by the Immigration Act . . .

"The court went on to say: This situation might well appeal to us if we had any discretion in the matter, but we have none; and the sole question is whether or not appellant comes within [29] the provisions of the Immigration laws.

"Unfortunately, appellant was the author of his own misfortune. As a fisherman, he must have known the perils of the sea, and in making the voyage into foreign waters he knew that he might not be able to return to the United States. In fact, he testified at the hearing: 'I fully understood that touching any foreign land would make it difficult for me to return to the United States and it would be against the Immigration laws, but during a heavy storm our ship collided with another and sank off Santa Margarita Island, Lower California, Mexico. It was either life or death, and the captain instructed us to land on Santa Margarita Island, and everything would be all right. I have nothing else to offer.'

"Under the immigration laws and the interpretation placed thereon by the Supreme Court, we are compelled to hold that, notwithstanding the misfor-

tune which befell appellant, he was coming from a foreign country and therefore was subject to the immigration laws the same as though he had never resided in the United States. United States ex rel Leo Stapf, petitioner v. Edward Corsi, 287 U. S. 129, Commissioner of Immigration, 53 S. Ct. 40, 77 L. Ed....., decided by the Supreme Court November 7, 1932."

The Supreme Court of the United States, in U. S. ex rel. Volpe v. Smith, 289 U. S. 422, decided on May 22nd, 1933, had under consideration the specific question of what constituted an entry into the United States and said:

"The power of Congress to prescribe the terms and conditions upon which aliens may enter or remain in the United States is no longer open to serious question. Turner v. Williams, 194 U. S. 279; Low Wah Suey v. Backus, 225 U. S. 460, 468; Bugajevitz v. Adams, 228 U. S. 585, 591.

"That the second coming of an alien from a foreign country into the United States is an entry within the usual acceptation of that word is clear enough from Lewis v. Frick, 233 U. S. 291; Claussen v. Day, 279 U. S. 398."

The latest decision of the Circuit Court of Appeals for the Ninth Circuit is in the case of Albert Del Guercio District Director, appellant, vs. Jose Audon Salazar Delgadillo, No. 11225, decided January 22nd, 1947, 159 Fed. (2d) 130, in which case appellee, a citizen of Mexico was admitted to the United States for permanent residence in 1923, and continued to reside here until June, 1942. During that month he shipped as a member of the

crew of the American Ship "Andrew Jackson," then under the operational [30] control of the United States Government, through the War Shipping Administration. On July 12th, 1942, the "Andrew Jackson" was torpedoed by the enemy off the coast of Cuba. Appellee was rescued and taken to Cuba, where he remained one week. He was then flown to Miami, Florida, and admitted to the United States in transit by immigration officers for a period of not more than thirty days for the purpose of reshipping foreign from San Pedro, California. The Circuit Court held that his arrival at Miami, Florida, in July, 1942, after landing in Cuba, was an entry within Sec. 19 (a) of the Immigration Act and that he was subject to deportation for having been convicted of second degree robbery and sentenced to imprisonment from one year to life, within five years after this last entry into the United States.

The rulings of the foregoing authorities on what constitutes an entry or reentry by the Circuit Court, and by the Supreme Court of the United States, may be recapitulated as follows: Where there is a departure from the United States, even into foreign waters, and a return into the United States, without the vessel having touched at a foreign port, no entry exists on the part of an alien entering or reentering into the United States; but where a foreign port is touched, even though involuntarily on the part of the alien, a return into the United States constitutes an entry or a reentry, under Sec. 19 (a) of the Immigration Act of February 5th, 1917, 39 Stat. 889 (8 U. S. C. A. Sec. 155 (a) (which Section, by the way, was intended to protect this country from criminals) (*Volpe v. Smith*, 289 U. S. 422.)

John Delaney, even though he enlisted in the U. S. Merchant Marine from the highest of patriotic motives, was accepted as an American citizen by jus soli, on the documentary evidence that he had in his possession at the time he enlisted, was in the zones of combat, risked his life for his country, [31] and had no control over his destination in foreign territory, nevertheless, he must be held to have made a reentry into this country when he landed at San Pedro, California, on the SS. "Schenectady" on May 20th, 1945, as the word "entry" or "reentry" is defined in the Statute, as interpreted by the courts. It is just another example of an unjust law that should be changed by Congress, or re-examined by the courts.

Had the petitioner, John Delaney, been a slacker in the recent war, and remained in the United States, this question would not have arisen. The government he served and helped preserve now would deny him the right to remain in this country, or technically, would deny his reentry therein.

He was above the age of those called for actual combat; he could have secured non-combatant work in the United States. His error, if any, in the eyes of a highly technical construction of the law, was that he served during the war in an important branch of that great effort and did his bit to preserve our liberties.

Now our government, instead of commending him for patriotic service in the highest and best traditions of our history, would deny him the right to remain in this country. He registered for the draft; he claimed no exemption as many others did; ~~he, in all probability, could have engaged in non-combat work in the armed forces.~~

This court joins the judges of the Ninth Circuit in pointing out the harshness and injustice of the law. Circuit Judge Sawtelle, speaking for a unanimous court (Wilbur, Mack), in *re Taguchi vs. Carr*, *supra*, said:

"This situation might well appeal to us if we had any discretion in the matter, but we have none and the sole question is whether or not appellant comes within the provisions of the immigration laws."

The vigorous dissent of Justice Murphy in *re Cleveland v. U. S.* (October Term, 1946) 329 U. S. 14 is worthy of note(12). [32]

While the decisions of the Ninth Circuit are binding on this court, and decisions of the Supreme Court binding on both the Circuit Court and this court, it is refreshing to find expressions such as we find from the pen of Justice Rutledge in the *Cleveland* case. It is the opinion of this court that the harshness, severity and injustice of

(12) (Dissent of Justice Murphy) "Yet this court in *Caminetti v. United States*, 242 U. S. 470, over the vigorous dissent of Justice McKenna in which Chief Justice White and Justice Clarke joined, closed its eyes to the obvious and interpreted the broad words of the statute without regard to the express wishes of Congress. I think the *Caminetti* case can be factually distinguished from the situation at hand since it did not deal with polygamy. But the principle of the *Caminetti* case is still with us today, the principle of interpreting and applying the White Slave Traffic Act in disregard of the specific problem with which Congress was concerned. I believe the issue should be met squarely and the *Caminetti* case overruled. It has been on the books for nearly 30 years and its age does not justify its continued existence. *Stare decisis* certainly does not require a court to perpetuate a wrong for which it was responsible, especially when no rights have accrued in reliance on the error. *CF. Helvering v. Hallock*, 309 U. S. 106, 121-22, Otherwise the error is accentuated; and individuals, whatever may be said of their morality, are fined and imprisoned contrary to the wishes of Congress. I shall not be a party to that process."

several provisions of the immigration laws should be corrected by the higher courts or by Congress. This court has no power except to respectfully make the suggestion. Trial courts come in direct contact with many of these problems.

The court, up to this point, has assumed that John Delaney was an alien, but without having expressed its opinion as to his status.

Was John Delaney an American citizen by jus soli at the time of his arrival at San Pedro, California, on the SS. "Schenectedy" on May 20th, 1945?

This court has read with considerable care the proceedings had at San Pedro, California, before the Board of Special Inquiry, dated May 21st, 1945; May 22nd, 1945; May 23rd, 1945; May 28th, 1945; June 9th, 1945; June 22nd, 1945, and June 26th, 1945; and the proceedings before the reopened hearing at the same place on September 18th, 1946, together with the exhibits attached thereto, at which hearings John Delaney was examined by different examiners, to ascertain his status as an American [33] citizen, native born; and, while there are contradictory statements of John Delaney in the record, having in mind the conditions under which they were made, and the exigencies in which John Delaney found himself at the time, the Court feels that John Delaney has established his status as a native born American Citizen, having been born in Brooklyn, New York, on November 14th, 1898, and will so hold. The court is assuming that, because this is an exclusion proceeding, John Delaney has the burden of proof to establish this fact by a fair preponderance of the evidence.

Quaere: When John Delaney joined the United States Maritime Service, the United States Government accepted him as an American citizen, based upon his oath of allegiance to the United States and whatever documentary evidence of that fact he happened to have in his possession at that time, when it was known that he would be risking his life for his country; and, if the Government wished to dispute his American citizenship, why did it not do so at that time, instead of waiting until he arrived on the SS. "Schenectedy" at San Pedro, California, on May 20th, 1945?

John Delaney stated his father's name was Michael Delaney and that, according to his knowledge and belief, he (the father) was born in Cork County, Ireland; lived in the [34] United States many years, but did not know the dates; that his mother, Margaret Bridget Whalen, was born in Ireland and might have become a citizen of the United States. John Delaney stated that his father and mother were married in Philadelphia, Pennsylvania, that they later moved to Brooklyn, New York; that he was a week old when his mother died in Brooklyn, New York; that his father later married his stepmother, Mary Grady Delaney; that his father later returned to Ireland and died there when he (John Delaney) was about eighteen or nineteen years of age; and that his stepmother, Mary Grady Delaney, took him to Ireland when he was about two or three years' old.

The strongest written evidence in the case to support this contention of John Delaney's birth in the United States is the certificate of marriage of his parents, a certified copy of which is in evidence as petitioner's Exhibit No. 1, showing that M. Delaney and Bridget Whalen were married in Philadelphia on October 22nd, 1896.

According to John Delaney's delayed birth certificate, John Delaney represents himself as having been born at Brooklyn, New York, on November 14th, 1898, or a little over two years after his parent's marriage, which delayed birth certificate represents his father to be Michael John Delaney, and his mother to be Mary Grady, rather than Margaret Bridget Whalen, his natural mother. While the respondent herein doubts that the names appearing on the marriage license, exhibit 1, are the names of his natural parents, nevertheless, it seems to the court that John Delaney must have received information from some original source that his parents had been married in Philadelphia on or about the date indicated, for, if such had not been the case, he would have been writing to every Bureau of Vital Statistics in the country to have obtained such a certificate with the name of Delaney thereon. [35]

Hearsay Evidence Admissible to Prove Pedigree:

John Delaney further stated that his father had told him that he (John Delaney) had been born in America and that he (John Delaney) had been brought to Ireland by his stepmother after he (the father) had returned to Ireland (page 31 of the record of the hearing before the Board of Special Inquiry). While this statement on the part of John Delaney may be hearsay and a self-serving declaration, nevertheless, under one of the exceptions to the hearsay rule of evidence, it is admissible for whatever weight the court may desire to give to it.

Under Sec. 1870 of the Code of Civil Procedure of the State of California, and in conformity with the provisions therein, sec. 4, evidence may be given upon a trial of the following facts:

“The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth,

marriage or death of any person related by blood or marriage to such deceased person”

subject, of course, to being disproved by the opposing side. This the Immigration and Naturalization Service has not done to the satisfaction of the court. See also Sec. 312 (316) of Jones on evidence civil cases (second edition)(13). [36]

“The testimony of a father, that his children were born in California, puts the question of their citizenship beyond cavil.” *Thompson v. Spray*, 72 Cal. 528, 14 P. 182.

“Evidence that a certain person was born in New York, was taken at a tender age to Ireland, and then returned to this country, justifies the court in finding him to be a citizen, despite the fact that, believing himself to be an alien, he had filed a declaration of intention to become a citizen.” *Golden Fleece Gold etc. Min. Co. v. Cable Cons. Gold, etc. Min. Co.*, 12 Nev. 312 (11 C. J. p. 787—Note A.) The court feels that, regardless of who has the burden of proof to prove citizenship and/or alienage,

(13) Sec. 312 (316) of Jones on evidence civil cases (2nd Ed.) “Declarations as to pedigree—reason for the exception (to the hearsay rule). The well known exception to the general rule excluding hearsay, under which certain declarations of deceased persons may be admitted in cases of pedigree, rests in part on the supposed necessity of receiving such evidence to avoid a failure of justice, and in part on the ground that individuals are generally supposed to know and to be interested in those facts of family history about which they converse, and that they are generally under little temptation to state untruths in respect to such matters which might be readily exposed . . . The declarations of deceased persons may be received, subject to the qualifications hereafter named, when such declarations refer to the age, relationship, birth, marriage, death or legitimacy of persons legally related by blood or marriage to the declarant. But the declarations must have been made before the controversy in relation to which they are to be proved arose.”

which is evidently on the petitioner in view of the fact that this is an exclusion proceeding, that John Delaney has met this burden by a fair preponderance of the evidence by his allegations of birth in this country, in accordance with one of the exceptions to the hearsay rule of evidence, which allegations have not been disproved by the respondent, although the respondent conducted extensive investigations in Ireland to prove his birth in that country.

John Delaney remembers that when his father put him to school in Ireland he registered him as a citizen of the United States; and that he attended the national school Shambaley in the County of Cork, and the Carrigaline male National school in the County of Cork, Ireland. He quit school at about fourteen or fifteen years of age, and first went to sea when he was a youngster, as a wiper—about eighteen years or less. John Delaney further stated that when he first returned to the United States on the “John Ludgate” he gave his nationality as an American (page 35); and that when he shipped out of the United States during 1917 or 1918, he gave his nationality as American; also that when he registered for the draft in 1917 he registered as a United States citizen, but was turned down because of flat feet; also, when he registered under the present Selective [37] Service System, he represented himself to be an American citizen by birth.

John Delaney has maintained a residence in the United States for about thirty years, and during this time he has never left the United States for any purpose other than to follow the occupation of a seaman, and the animus reverendi has always been present in his heart and mind.

Generally its is presumed, at least until the contrary appears, that every person is a citizen of the country in which he resides, *Shelton v. Tiffin*, 6 How. (U. S.) 163, 12 L. Ed. 387.

According to his testimony he has:

- (1) Never applied to any American consul for an immigration visa;
- (2) Never paid a head tax at any immigration port of entry;
- (3) Never been excluded from admission to the United States;
- (4) Never been deported from the United States;
- (5) Never been confined in an institution for the treatment of the insane or feeble minded;
- (6) Never been arrested;
- (7) Never applied for admission to the United States for permanent residence as an alien;
- (8) Never been admitted to the United States as an alien for permanent residence;
- (9) Never has had an American or British passport, or a passport of any other country;
- (10) Never has had in his possession any kind of an official paper issued by any country showing his birth place and citizenship, except seaman's discharge papers;
- (11) Never lived in England;
- (12) Never voted in England;

but:

- (13) has voted in New York in 1926 and/or 1927, and in Long Beach, California, in 1941, or at any rate has been registered to vote. [38]

The Government, as is reflected by the record of these proceedings, made extensive investigations, both in this country and in Ireland, to disprove the contention of John Delaney that he was born in Brooklyn, New York, but without success.

Contradictory Statements and/or Untrue Statements, of
John Delaney Considered By the Court:

The court is well aware of the fact that there are contradictory and/or untrue statements in the record which give considerable weight to the contention of the Immigration and Naturalization service that John Delaney is not an American citizen by birth, and which warrant his being excluded from this country, all of which have been considered by the court, but it will not be necessary to refer to all of them.

In the hearing before the Board of Special Inquiry, held at San Pedro, California, (page 3 of the record) petitioner John Delaney stated that the reason he told the authorities of the vessel "Nehian", in November of 1924, that he was a British subject was that they would not have hired an American citizen; and likewise, when asked why he registered as an alien on December 16th, 1940, at Long Beach, California, he stated he could get no record of his birth in Brooklyn, New York, and needed a record to obtain employment.

The court believes that John Delaney has satisfactorily answered the questions as to why he represented himself

to be a British subject in November of 1924, when he shipped on the SS. "Nehian" in 1924; and registered as a friendly alien during World War Two on December 16th, 1940, at Long Beach, California; which events both happened prior to the time he was able to obtain a certified copy of his parent's marriage in Philadelphia, Penna., dated December 1st, 1943, mailed to him from Philadelphia by the Department of Public Health. [39]

Since 1941, John Delaney has consistently maintained his American birth in Brooklyn, New York, as is evidenced by his application for original license (Ex. 5); his Application for identification card (Ex. 6); and his application for extension of route or raise of grade of license (Ex. 7), all attached to the record of hearing before the Board of Special Inquiry held at San Pedro, California, in which he represented himself as having been born in this country.

This court, in addition to the statements made by John Delaney relative to his pedigree, clearly admissible as exceptions to the hearsay rule of evidence, will require no greater documentary evidence of his citizenship than that which was acceptable to the United States Maritime Service when he joined that service. John Delaney, as a second Assistant Engineer on the SS. "Schenectady," went into the war zones to risk his life, or even die for his country, if necessary, all the time firmly believing that he was an American citizen by birth. If John Delaney had been less patriotic and more timid, in other words a slacker, he would not have found himself in his present predicament, or have been incarcerated by the Immigration officials at San Pedro, California, for six weeks practically incommunicado. John Delaney is not a homo sine patria, but a citizen of the United States by jus soli, and

is not subject to exclusion proceedings. His domicile or residence is in the United States of America.

In the case of *People v. Guariglia*, decided by the Kings County Court, New York, on October 1st, 1946, 65 N. Y. Sup. (2d) 96, a seduction case, where the court had for consideration the question of whether or not the statute of limitations of that state ran against the defendant while he was without the State of New York as a member of the United States Army in the European theatre of operation, the Court held that it did on the theory that he continued to be an inhabitant or resident [40] of the State. The court said:

“Applied to the instant case, it is clear that while the defendant was in the armed forces he continued to be both an inhabitant and a resident of the State. Indeed the People stipulated on the trial that at and prior to September 24, 1943, the date of the seduction “the defendant resided in the County of Kings State of New York, where he was domiciled. * * * That from October 15, 1943 to on or about December 15, 1945, continuously, the defendant was without the State of New York as a member of the U. S. Army in the European theatre of operations under the orders of his superior, and that his domicile continued in the State of New York during that period.’

“Even in the absence of such stipulation the decisions hold that a soldier continues to be an inhabitant or resident of the State for the purpose of voting etc. ‘In legal phraseology “residence” is synonymous with “inhabitancy” or “domicile”’, *De Meli v. De Meli*, 120 N. Y. 485, 491, 24 N. E. 996, 998, 17 Am. St. Rep. 652. * * * A soldier in

military service remains an inhabitant of the State.
 * * * 15 Am. Jur. 37. '*A seaman on a long voyage and a soldier in actual service, may be respectively inhabitants of a place, though not personally present there for years.*' Sears v. City of Boston, 1 Metc. 250, 42 Mass. 250. (Italics supplied.)

If this theory should be supported by the Circuit Court of Appeals for the Ninth Circuit it would make no difference whether or not John Delaney was, or was not, a native born citizen of the United States by jus soli during the time he was on the SS. "Schenectady", for, in legal contemplation, he never did leave the United States.

The writ of habeas corpus is hereby granted; the petitioner, John Delaney, is ordered released from technical custody, and his bond is ordered exonerated.

Counsel for the petitioner will prepare Findings of Fact and Conclusions of Law, and a judgment, in accordance with this opinion, within ten days, after having presented same to counsel for the respondent herein for approval as to form.

Dated at Los Angeles, Calif., this 21 day of February, 1947.

J. F. T. O'CONNOR
 U. S. District Judge

[Endorsed]: Filed Feb. 21, 1947. Edmund L. Smith, Clerk. [41]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled matter came on regularly to be heard upon the petition of John Delaney, for a Writ of Habeas Corpus to which petition a return thereto was filed by the Department of Justice Immigration and Naturalization Service, Los Angeles, California, District No. 16, denominated respondent through Albert Del Guercio, its district director and upon the traverse of the petitioner to said return and the further supplemental return filed by the respondent before the Honorable J. F. T. O'Connor, district Judge for the District Court of the United States, in and for the Southern District of California, Central Division.

The petitioner being present in person and represented by his Attorney David C. Marcus, Esquire of Los Angeles, California, and the respondent being represented by James M. Carter, Esquire, United States Attorney, Robert Wright, Esquire, Assistant United [42] States Attorney and Bruce G. Barber, Esquire, Chief Adjudications Division United States Immigration and Naturalization Service, all of Los Angeles, California.

That said matter was heard by the above entitled Court on the 14th day of January, 1947; that evidence both oral and documentary was introduced on behalf of the petitioner and respondent, the Court being fully advised by oral argument and briefs submitted by respective counsel, and the cause thereupon having been submitted and the Court having rendered its written opinion granting said Writ of Habeas Corpus and directing counsel for peti-

tioner to prepare Findings of Fact and Conclusions of Law, in accordance with its opinion, it is therefore the Findings of Fact of the Court as follows:

I.

It is true that petitioner John Delaney, in the year 1943 upon entering the service of the United States Maritime Service took oath of allegiance to the United States Government, that while in such service he was paid by the United States Government, through the Treasurer of the United States, in Washington, D. C., that during his entire service of enlistment extending over a period of approximately a year and six months, petitioner was assigned to the S. S. "Schenectady" a tanker owned and operated by Beacon Hill Shipping Co., agents for the United States War Shipping Administration, as engineer; that he was commissioned a Lieutenant in the United States Naval Reserve and that he was ordered to sea by the United States Coast Guard; that penalty for failure to obey orders was Court Martial.

II.

That pursuant to his orders petitioner John Delaney, departed from the United States on June 10, 1944, aboard the S. S. "Schenectady" an armed oil tanker which rendezvoused with the United [43] Fleet upon the high seas supplying it with oil. Petitioner, as a member of the crew of said vessel went to Australia, the Persian Gulf, New Zealand, the Marshall Islands, Curacao, Dutch West Indies, through the Panama Canal, to the Marshall and Admiralty Islands and Ulithi, Caroline Islands and thence returned to San Pedro, California, United States of America, on the 20th day of May, 1945. That petitioner was in battle engagements in the Marshall Islands and

Ulithi and was awarded the Atlantic War Zone Bar, the Mediterranean Middle East War Zone Bar, the Pacific War Zone Bar, and the Merchant Marine Combat Bar.

III.

That it is true that petitioner upon his departure from the United States aboard the S. S. "Schenectady" intended to return and during his entire foreign service upon the high seas served aboard the said S. S. "Schenectady." That it is true that petitioner entered the United States from said vessel on May 20, 1945, returned to his home in Long Beach, California, resumed his residence, and not until May 21, 1945, did he first learn or was advised that the Immigration Office at San Pedro, California, desired that he report to them, which said petitioner in the uniform of an officer in the Merchant Marine did thereupon report to said immigration Office.

IV.

That it is true that petitioner was then and there taken into custody by said Immigration Service, respondent herein, detained, restrained and deprived of his liberty until the issuance by this Court of its Writ of Habeas Corpus.

V.

That it is true that petitioner John Delaney, upon his return to the United States entered or reentered the United States on May 20, 1945.

VI.

That it is true that John Delaney, was born in Brooklyn, [44] New York, on November 14, 1898, to John Delaney, father and Margaret Bridget Whalen, mother.

VII.

That it is true that his father, John Delaney and his mother Margaret Bridget Whalen, were married in Philadelphia, Pennsylvania, on October 22, 1896.

VIII.

That it is true that Delaney's mother died in Brooklyn, New York, a week after the birth of petitioner; that his father then married Mary Grady and returned to Ireland with petitioner as an infant.

IX.

That it is true that petitioner returned and entered the United States at Wilmington, North Carolina on November 14, 1924 and since that time he did not leave or depart from the United States for any foreign port or destination but was continuously employed in the United States, until his departure aboard the S. S. "Schenectady," on June 10, 1944 as aforesaid.

X.

That it is true that petitioner:

- (1) Never applied to any American Consul for an Immigration visa;
- (2) Never paid a head tax at any Immigration port of entry;
- (3) Never has been excluded from admission to the United States;
- (4) Never has been deported from the United States;
- (5) Never has been confined in an institution for the treatment of the insane or feeble minded;
- (6) Never has been arrested;
- (7) Never has applied for admission to the United States for permanent residence as an alien; [45]
- (8) Never has been admitted to the United States as an alien for permanent residence;

- (9) Never has had an American or British passport or a passport of any other country;
- (10) Never has had in his possession any kind of an official paper issued by any country showing his birth place and citizenship, except seaman's discharge papers.
- (11) Never has lived in England.
- (12) Never has voted in England.

XI.

That it is true that petitioner has voted in New York, in 1926 and 1927, and in Long Beach, California, in 1941 and has been a continuous resident of the United States for a period of approximately 30 years.

XII.

That it is true that petitioner registered for the Selective Service Draft in the United States in 1917 and in 1940, claiming American citizenship by birth.

XIII.

That it is true that John Delaney, enlisted in the United States Maritime Service; commissioned a lieutenant in the United States Naval Reserve; directed and ordered to ship aboard a United States registered armed tanker; took oath of allegiance to the United States Government; risked his life for his country and at all times claiming United States citizenship by birth and was accepted for service, by the United States Maritime Service, commissioned as an officer in the Naval Reserve, served aboard United States, registered armed vessel as an American citizen by birth.

XIV.

That it is not true that petitioner was born at Cork, Ireland or is a citizen of Ireland. [46]

XV.

That it is true that petitioner is of good moral character.

That by Reason of the Foregoing Findings of Fact the Court Does Hereby Make and Enter Its Conclusions of Law:

I.

That petitioner herein is an American citizen by birth and has continued to be and now is an American citizen by birth.

II.

That petitioner herein is an American citizen by Jus Soli and is not a citizen of any other country.

III.

That petitioner John Delaney, is illegally and unlawfully detained, confined and restrained of his liberty by the respondent Department of Justice, Immigration and Naturalization Service, at Terminal Island, Los Angeles, California.

IV.

That petitioner is entitled to a Writ of Habeas Corpus, to be released from custody and his bond exonerated.

Let Judgment be entered accordingly.

Dated: This 28 day of May, 1947.

Recd. May 22, 1947.

J. F. T. O'CONNOR

Judge of the U. S. District Court

[Endorsed]: Filed May 28, 1947. Edmund L. Smith,
Clerk. [47]

In the District Court of the United States
in and for the Southern District of California
Central Division

No. 4591-O'C. Civil

In the Matter of the Application of

JOHN DELANEY

For a Writ of Habeas Corpus.

JUDGMENT

The above entitled matter coming on regularly to be heard upon the petition of John Delaney, for a Writ of Habeas Corpus to which petition a return was filed by the Department of Justice Immigration and Naturalization Service, Los Angeles, California, District No. 16, denominated respondent through Albert Del Guercio, its district director and upon the traverse of the petitioner to said return and the further supplemental return filed by the respondent before the Honorable J. F. T. O'Connor, District Judge for the District Court of the United States in and for the Southern District of California, central division.

The petitioner being present in person and represented by his Attorney David C. Marcus, Esquire of Los Angeles, California, and the respondent being represented by James M. Carter, Esquire, United States Attorney, Robert Wright, Esquire, Assistant United States Attorney and Bruce G. Barber, Esquire, Chief Adjudications Division, United States Immigration and Naturalization Service, all [48] of Los Angeles, California.

That said matter was heard by the above entitled Court on the 14 day of January, 1947; that evidence both oral

and documentary was introduced on behalf of the petitioner and respondent, the Court being fully advised by oral argument and briefs submitted by respective counsel, and the cause thereupon having been submitted and the Court having rendered its written opinion granting said Writ of Habeas Corpus and directing counsel for the petitioner to prepare findings of fact and conclusions of law in accordance with its opinion and findings of fact and conclusions of law having been prepared, signed and filed it is therefore the order and judgment of this Court:

- (1) The petitioner John Delaney, is an American citizen by birth and has continued to be and now is an American citizen by birth.
- (2) The petitioner herein is an American citizen by Jus Soli and is not a citizen of any other country.
- (3) The petitioner John Delaney, is illegally and unlawfully detained, confined and restrained of his liberty by the respondent Department of Justice Immigration and Naturalization Service at Terminal Island, Los Angeles, California.
- (4) The petition for Writ of Habeas Corpus is hereby granted, the petitioner is ordered released from custody and his bond exonerated.

Done in open Court, this 28 day of May, 1947.

J. F. T. O'CONNOR
Judge of the U. S. District Court

Judgment entered May 28, 1947. Docketed May 28, 1947. Book C. O. B. 43, page 374. Edmund L. Smith, Clerk, by Francis E. Cross, Deputy.

[Endorsed]: Filed May 28, 1947. Edmund L. Smith, Clerk. [49]

[Title of District Court and Cause]

NOTICE OF APPEAL

To John Delaney, petitioner, and David C. Marcus, his attorney, 206 South Spring Street, Los Angeles, California:

Please take notice that respondent appeals from the entire judgment entered in this cause on May 28, 1947, to the Circuit Court of Appeals, Ninth Circuit.

Dated: August 25, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

ROBERT E. WRIGHT

Assistant U. S. Attorney

Attorneys for Respondent

ALBERT DEL GUERCIO

District Director, United States Department of Justice,
Immigration and Naturalization Service, District
No. 16

[Endorsed]: Filed; mld. copy to David C. Marcus, atty. for petnr., Aug. 25, 1947. Edmund L. Smith, Clerk. [50]

[Title of District Court and Cause]

STIPULATION AND ORDER FOR TRANSMITTAL
OF ORIGINAL EXHIBITS

It is stipulated between the parties hereto that the original exhibits introduced on the trial of this cause may be transmitted to the Circuit Court of Appeals in lieu of the reproduction of the said exhibits as a part of the printed record on appeal.

Petitioner's Exhibits 1, 2, 3, 4, 5, 6 and 7 are identified and received in evidence on pages 3, 10, 10, 11, 13, 20 and 23 respectively of the reporter's transcript of proceedings at the trial.

Respondent's Exhibits A and B are identified and admitted in evidence at page 52 of the reporter's transcript of proceedings at the trial.

Said exhibits shall be transmitted by the Clerk of this court to the said Circuit Court of Appeals for the Ninth Circuit, with the record on appeal in this cause, and when the appeal in this cause has been heard and determined, said exhibits shall be returned to the Clerk of this court by the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant United States Attorney

ROBERT E. WRIGHT

Assistant U. S. Attorney

Attorneys for Respondent-Appellant

DAVID C. MARCUS

Attorney for Petitioner-Appellee

It Is So Ordered this 24 day of September, 1947.

J. F. T. O'CONNOR

Judge U. S. District Court

[Endorsed]: Filed Sep. 24, 1947. Edmund L. Smith,
Clerk. [51]

[Title of District Court and Cause]

STIPULATION AS TO RECORD

It is stipulated between the parties hereto that the transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above entitled cause, shall include the complete record including, but without limitation of the generality hereof, this stipulation and the stipulation for the transfer of the original exhibits, and including stenographic transcript of proceedings.

Said transcript to be prepared as required by law and the rules of this court and the Federal Rules of Civil Procedure, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit as required by law and said rules.

Dated: September 24, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

ROBERT E. WRIGHT

Assistant U. S. Attorney

Attorneys for Respondent-Appellant

DAVID C. MARCUS

Attorney for Petitioner-Appellee

[Endorsed]: Filed Sep. 24, 1947. Edmund L. Smith,
Clerk. [52]

[Title of District Court and Cause]

STIPULATION FOR SUBSTITUTION OF PARTY
RESPONDENT

Whereas Albert Del Guercio is no longer District Director, United States Department of Justice, Immigration and Naturalization Service, District No. 16, and said office is now occupied by William A. Carmichael;

It is stipulated that William A. Carmichael, District Director, United States Department of Justice, Immigration and Naturalization Service, District No. 16, may be substituted as party-respondent in this action for Albert Del Guercio, who at the time of the institution and prosecution thereof held the office of said District Director.

Dated: September 26, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

ROBERT E. WRIGHT

Assistant U. S. Attorney

Attorneys for Respondent-Appellant

DAVID C. MARCUS

Attorney for Petitioner-Appellee

It is so ordered this 26 day of Sept., 1947.

J. F. T. O'CONNOR

Judge, U. S. Dist. Ct.

[Endorsed]: Filed Sep. 26, 1947. Edmund L. Smith,
Clerk. [53]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 53, inclusive, contain full, true and correct copies of Petition for a Writ of Habeas Corpus; Return to Writ of Habeas Corpus; Traverse; Opinion of the Court Granting Writ of Habeas Corpus; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Stipulation and Order for transmittal of Original Exhibits; Stipulation as to Record and Stipulation and Order Substituting Party Respondent which, together with Original Petitioner's Exhibits 1 to 7, inclusive; Original Respondent's Exhibits A and B and copy of Reporter's Transcript of Proceedings held on January 14, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 30 day of September, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable J. F. T. O'Connor, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, January 14, 1947

Appearances:

For the Petitioner: David C. Marcus, Esq.

For the Government: Robert E. Wright, Esq., Assistant United States Attorney.

Los Angeles, California, Tuesday, January 14, 1947,
10:00 a. m.

JOHN DELANEY,

the petitioner, called as a witness in his own behalf,
being first duly sworn, testified as follows:

The Clerk: Your full name is John Delaney?

The Witness: Yes.

Direct Examination.

By Mr. Marcus:

Q. Mr. Delaney, what is your business or occupation?

A. Marine engineer.

Q. By whom are you employed at the present time?

A. The United States Government.

Q. Where at?

A. Terminal Island.

Q. What kind of work are you doing now?

A. Supervising the installation of engines and machinery in ships.

Q. Of what country are you a citizen?

A. The United States.

(Testimony of John Delaney)

Q. When and where were you born?

A. In the United States.

Q. Where were you born?

A. Brooklyn, New York.

Q. What date? [2*]

A. The 14th of November, 1898.

Q. Were your father and mother married in the United States? A. Yes, sir.

Q. What was your mother's name?

A. Bridget Whalen.

The Court: Your parents were married where?

A. Philadelphia.

Q. By Mr. Marcus: I have the marriage certificate here. What was your afther's name?

A. Michael Delaney.

Q. I show you a marriage certificate dated October 22, 1896. The certificate is dated December 1, 1943, but the date of the marriage is indicated as on October 22, 1896, license No. 88243, issued to M. Delaney and Bridget Whalen, both of Ireland, showing the marriage of M. Delaney and Bridget Whalen on October 22, 1896, by Rev. John Scully, 317 Willings Abbey, Roman Catholic Church.

I offer that in evidence.

Mr. Wright: I object to it upon the ground that it is already in the record, as a part of the proceedings.

The Court: It may be received.

The Clerk: This will be Petitioner's No. 1 in evidence.

(The document referred to was marked Petitioner's Exhibit No. 1 and was received in evidence.) [3]

*Page number appearing at top of page of original Reporter's Transcript.

(Testimony of John Delaney)

Q. By Mr. Marcus: When did you first depart from the United States, Mr. Delaney?

A. My father took me when I was a child.

Q. How old were you, approximately?

A. About a year old.

Q. Where did you go? A. To Ireland.

Q. Did your mother go with you?

A. No, my mother died.

Q. When?

A. In childbirth.

Q. Your father remarried? A. Yes, sir.

Q. Before departing for Ireland? A. Yes, sir.

Q. How long did you remain in Ireland?

A. Until I was about 15 or 16 years old.

Q. Did you then return to the United States?

A. Yes, sir.

Q. What year was that, approximately?

A. Oh, I would say it was around '12 or '13; something like that. I am not sure of the year.

Q. How did you come to the United States at that time?

A. I ran away from home. I got a job on a ship, and came out here as a wiper in the engine room. [4]

Q. How long did you remain in the United States at that time? A. Until 1924.

Q. Did you reside continuously in the United States at that time? A. Yes, sir.

Q. What happened in 1924?

A. I went on a ship again. I shipped out in 1924 on an American ship. We went to Europe, and I lost my ship in Europe, and I came back then in November, 1924. We left in August, 1924.

(Testimony of John Delaney)

Q. You attended school in Ireland, did you, during the period that you resided there? A. Yes, sir.

Q. Do you remember the name of the ship on which you entered the United States in 1924?

A. The Ninian.

Q. That is spelled N-i-n-i-a-n?

A. Yes.

Q. You resided continuously in the United States since that entry in 1924? A. Yes, sir.

Q. You worked for the government in the Geodetic Survey? A. Yes.

Q. What year. [5]

A. 1924. I worked about a year, I think, with the United States Geodetic Survey Service in Florida.

Q. You continued to reside in the United States continuously since 1924? A. Yes, sir.

Q. Until when? A. Until 1943.

Q. What did you do in 1943?

A. I went in the Naval Reserve. They were calling all engineers up. The Army called me. Also, I preferred to go into the Naval Reserve.

Q. Did you enter the Naval Reserve?

A. Yes, sir, the United States Merchants Marine Reserve. It is a branch of the United States Naval Reserve.

Mr. Wright: Objected to, your Honor, as a conclusion of law.

Mr. Marcus: That is not law. It is a fact.

Mr. Wright: That it is a branch of the United States Naval Reserve is a matter of law.

The Court: Lay a further foundation.

(Testimony of John Delaney)

Q. By Mr. Marcus: My Delaney, tell us where you went in 1943.

A. I went to the South Pacific.

Q. Not out of the United States—how did you enter the Service? [6]

A. The government called all engineers that had licenses.

Q. You had a license at that time? A. Yes.

Q. Where did you go?

A. I went to San Pedro. I saw the Coast Guard officer there. The Coast Guard officer signed me up and sent me to the Officers' School in San Francisco.

Q. In 1943? A. In 1943.

Q. Did you attend the Officers' School there?

A. Yes, sir.

Q. Were you commissioned at that time?

A. When I finished my training, sir, after I passed my examination.

Q. What were you commissioned?

A. A lieutenant.

Q. In what?

A. In the United States Merchant Marine Reserve.

Q. Then did you resign from that service?

A. I was discharged from that service.

Q. Then did you join the United States Naval Reserve?

A. That was the United States Naval Reserve. We had to join that in order to get on these ships. They had to have certain government men on each oil tanker to take charge of [7] the men.

Mr. Wright: Your Honor, I submit that there should be a document. The man said he was commissioned.

(Testimony of John Delaney)

The Court: Yes. Have you any document?

Mr. Marcus: That is, his release from the Maritime Service?

Mr. Wright: Yes. What was his commission in the Navy, or Naval Reserve?

The Court: Lieutenant in the Marine Reserve.

Mr. Wright: I understood him to say Naval Reserve, your Honor.

Mr. Marcus: Here is his commission, your Honor.

Q. I will ask you whether or not this is your commission in the United States Maritime Reserve as a lieutenant? A. Yes.

The Court: When was that issued?

Mr. Marcus: It was issued March 6th, 1944. John Delaney. Service No. 4433-00243. Issuing officer S. Patton.

Mr. Wright: Your Honor, I did not object when he asked him if this was his commission, but having his individual identification card is not a commission in anything.

Mr. Marcus: Let the court decide that. I will offer this in evidence at this time, with the privilege of withdrawing it.

Q. Mr. Delaney, were you issued that card at the time [8] you became a lieutenant in the Service?

A. After we were sworn in, sir.

Q. Is that what they gave you? A. Yes.

The Court: Did you receive any other commission?

The Witness: I received my commission with this paper, to relieve me from active duty in the United States Maritime Service.

The Court: What is the date of it?

(Testimony of John Delaney)

Mr. Marcus: United States Maritime Service. Release from active duty. This is to certify that John Delaney, 4433-00243, has been released from active duty as Lieut. on March 25, 1944, at San Francisco, Calif. and placed in an inactive status in the United States Maritime Service. Signed Lieut. S. U. Patton.

Is this the document you received prior to the time you were granted the identification card? A. Yes.

The Court: What is the date of it?

Mr. Marcus: March 2, 1944.

Mr. Wright: We have no objection.

The Court: In evidence. It may be withdrawn by the substitution of a photostatic copy.

Mr. Marcus: We offer this in evidence.

Mr. Wright: No objection to either of these. Of course [9] we are not conceding by that that they are competent or relevant.

The Clerk: These two documents are Petitioner's Exhibits 2 and 3, respectively, in evidence.

(The documents referred to were marked Petitioner's Exhibits 2 and 3, respectively, and were received in evidence.)

Q. By Mr. Marcus: I show you a card issued by the Captain of the Port at Los Angeles, to John Delaney, on December 27, 1943, indicating citizenship U. S. A., and ask you whether or not that card applies to you. A. Yes, sir.

The Court: Read it into the record.

Mr. Marcus: (Reading:) Identification only—not a pass.... Issued by Captain of Port Los Angeles. Name Delaney, John. Occupation, Engineer Officer. Sponsor,

(Testimony of John Delaney)

Various S. S. Co's. Validated—United States Coast Guard. R. D. Dyas C. Sp Genuine only if watermarked. U. S. C. G. No. 601693.

On the reverse it indicates as follows: Issued December 27, 1943. Expires when revoked. Citizenship USA. Place of birth, New York, U. S. A. Age 44. Height 5-6. Weight 150. Color eyes, blue. Color hair, blond. Bearing fingerprint, index finger, right hand. Signed John Delaney.

I offer this card in evidence.

Mr. Wright: I object to it as incompetent and irrelevant, your Honor. I have no objection to it being considered by the court.

The Court: It will be admitted in evidence. It may be withdrawn by the substitution of a photostatic copy.

The Clerk: Petitioner's Exhibit No. 4.

(The document referred to was marked Petitioner's Exhibit 4 and was received in evidence.)

Q. By Mr. Marcus: Mr. Delaney, subsequent to your commission, as a lieutenant, did you receive from the War Shipping Administration directions for you to proceed to San Francisco and report to the commanding officer of the United States Maritime Service?

A. Yes, sir.

Q. I will ask you whether or not these are the instructions that you received on March 2, 1944?

A. Yes, sir.

Mr. Marcus: May this be offered in evidence, letter dated March 2, 1944, from War Shipping Administration, directed to Delaney, John, Lieutenant U. S. Mari-

(Testimony of John Delaney)

time Service, from enrolling officer, Wilmington, California?

The Court: Read it into the record.

Mr. Marcus: (Reading): War Shipping Administration. Division of Training. United States Maritime Service.

March 2, 1944.

From: Enrolling Officer, Wilmington, California. [11]

To: Delaney, John Lt. USMS.

Subject: Orders; travel.

Reference: REO Telephone conversation Feb. 29, 1944.

1. Proceed immediately to San Francisco, California and report to the Superintendent or Commanding Officer of the U. S. Maritime Service Turbo-Electric School for training.

2. The travel necessary to the execution hereof is required by the public interest.

3. You will depart from Los Angeles, Calif. via S. P. R. R. at 1700 this date.

4. Following transportation is issued to you:

T. R. 51,476 & 51,477.

Meal Tickets 58991 & 58992 (Emergent 58993)

Geo. A. Coverdale, WSA U. S. M. S.

Enrolling Officer.

Q. Did you report pursuant to that order and direction? A. Yes, sir.

Q. And did you enroll and take courses provided under these instructions? A. Yes, sir.

(Testimony of John Delaney)

The Court: The document will be received and may be withdrawn upon the substitution of a photostatic copy.

The Clerk: That will be Petitioner's Exhibit No. 5 in evidence. [12]

(The document referred to was marked Petitioner's Exhibit 5 and was received in evidence.)

Q. By Mr. Marcus: Subsequent to your graduation from the school you stated that you were commissioned, according to this record, as a lieutenant?

A. Yes, sir.

Q. Did you receive any instructions then from the United States Maritime Service? A. Yes, sir.

Q. Or Naval Reserve, Maritime Service?

A. Yes, sir.

Q. What were those instructions?

A. To proceed to San Pedro.

Q. Did you proceed? A. Yes, sir.

Q. What year? A. That was 1944.

Q. What did you do then?

A. Then I was assigned to a ship.

Q. As what?

A. As second assistant engineer.

Q. What ship were you assigned to on your first voyage?

A. The De Golia, Edwin B. De Golia.

Q. The record indicates that you shipped January 5, 1944, from San Pedro, California, is that correct? [13]

A. Yes.

Q. Where did you go?

A. We went to Seattle.

(Testimony of John Delaney)

Q. From there where did you go?

A. Came back to San Pedro.

Q. Is that the only trip that you made in that vessel?

A. That is the only trip, yes. I was assigned then to go overseas.

Q. On June 6, 1944, the record indicates you shipped aboard the S. S. Schenectady, is that correct?

A. Yes.

Q. Where did you go?

A. Went to the Pacific and Atlantic.

Q. Under what orders did you ship on the S. S. Schenectady?

A. Under United States Reserve orders from the Coast Guard. The Coast Guard has jurisdiction over all the men.

Q. You shipped foreign on the S. S. Schenectady? What was your first trip?

A. The first trip on the S. S. Schenectady was foreign ports in the South Pacific and Atlantic.

Q. Where did you go first?

A. We went straight to Australia on that ship.

Q. What kind of a vessel was it?

A. Oil tanker. [14]

Q. Were you loaded at the time you departed from the United States? A. Yes, sir.

Q. Where did you receive your orders from to depart? A. From the Navy, sir.

Q. The United States Navy?

A. The Admiralty, yes.

Q. How do you know it was from the Admiralty?

A. We were under sealed orders all the time, attached to the American Fleet.

(Testimony of John Delaney)

Q. Where? A. Pacific Islands.

Q. You stated you first went to Australia?

A. Yes.

Q. What port did you visit in Australia?

A. New Zealand. We first went down to the Persian Gulf.

Q. What did you do there?

A. Loaded with oil there, and brought it back to Australia.

Q. Then what did you do?

A. Then we went back again and loaded oil there, and went back to the Marshall Islands, and the Admiralty Islands. We were supplying the Fleet with oil.

Q. How long were you in the South Pacific? [15]

A. One year and a month, I think.

Q. During that period of time from whom were you receiving your orders?

A. From the Fleet.

Q. Were you in contact with the Fleet?

A. Yes, sir, they were giving us our instructions.

Q. They were giving you your instructions?

A. Yes.

Q. As to what to do? A. Yes, sir.

Q. Where did you supply oil?

A. We supplied oil to the Fleet. We were six months with the American Fleet. Then they transferred to the English Fleet.

Q. Where did you go with the American Fleet?

A. We went to the Pacific.

Q. You were in the Pacific, were you not?

A. Yes, sir.

(Testimony of John Delaney)

Q. Were you in any engagements in the Pacific?

A. In the Marshall Islands, the Admiralty Islands, and Ulithy.

Q. Were you in those three engagements?

A. No, we got to the Admiralty Islands when the engagement was on.

Q. What engagements were you in? [16]

A. Marshall Islands and Ulithy engagements.

Q. Did you carry any guns on your ship?

A. Yes.

Q. Of what character?

A. 6-inch and 8 anti-aircraft guns.

Q. Did you have any Naval personnel on your ship?

A. Yes, sir.

Q. Who were those Navy personnel?

A. The gunnery men; the men who handled the guns. They were trained for that.

Q. Members of the United States Navy?

A. Yes.

Q. How about the captain?

A. The captain, he belonged to the Reserve, sir.

Q. On your various trips to the Persian Gulf and return to the Fleet, under whose instructions were you acting?

A. Under Fleet's orders, sir.

Q. Did you actually supply oil to the Fleet on the high seas?

A. No, we supplied the oil to the mother ship, the store ship.

Q. On the high seas?

A. In port; wherever we could find her; wherever she would meet us.

(Testimony of John Delaney)

Q. All those instructions, you stated, were given to you [17] from the United States Navy?

A. Yes, sir. They are all sealed orders; under sealed orders at all times, of the United States Navy.

Q. How do you know they were from the United States Navy?

A. The Captain told us when we got out so many degrees, where we had to go.

Q. You stated you were then assigned to the British Navy? A. Yes.

Q. Where was that?

A. We were sent to the British Fleet in the Pacific also.

Q. How long were you with the British Fleet?

A. Six months.

Q. What were you doing?

A. Supplying oil there.

Q. During your service on the S. S. Schenectady, with the British Fleet, were you acting under instructions? A. From the British Admiralty.

Q. Did you at any time serve aboard any other vessel besides the S. S. Schenectady?

A. No, sir.

Q. On this voyage? A. No, sir. [18]

Q. I will show you your certificates, issued by the Maritime Service—

Mr. Wright: Can't we stipulate to them, counsel?

Mr. Marcus: Yes. This is his combat certificate.

Mr. Wright: The words relate to the Pacific War Zone Bar and Merchant Marine Combat Bars. You don't need to identify these. You may introduce them. We make no objection to them.

(Testimony of John Delaney)

The Court: They may be received, subject to the same order of the court, that they may be withdrawn upon the substitution of photostatic copies.

Mr. Marcus: (Reading:) War Shipping Administration. This is to certify that Lieut. John Delaney has been awarded the Pacific War Zone Bar confirming active service with the United States Merchant Marine in that war area. Signed E. S. Land, Administrator. War Shipping Administration. This is to certify that Lieut. John Delaney has been awarded the Merchant Marine Combat Bar confirming active service with the United States Merchant Marine in a ship which was engaged in direct enemy action. E. S. Land, administrator.

War Shipping Administration. This is to certify that Lieut. John Delaney has been awarded the Mediterranean Middle East War Zone Bar, confirming active service with the United States Merchant Marine in that war area. E. S. Land, Administrator.

War Shipping Administration. This is to certify that [19] Lieut. John Delaney has been awarded the Atlantic War Zone Bar confirming active service with the United States Merchant Marine in that war area. E. S. Land, Administrator.

I offer these as one exhibit.

The Clerk: They will be Petitioner's Exhibit No. 6 in evidence.

(The documents referred to were marked Petitioner's Exhibit No. 6 and were received in evidence.)

(Testimony of John Delaney)

Q. By Mr. Marcus: Did you go to the Atlantic Ocean at any time on the Schenectady?

A. No, sir.

Q. You stated you were gone approximately one year and a few days, from the United States?

A. We left—

Q. In January?

A. No, we left on June, 1944. We got back June or July, I believe, 1945.

Q. You were aboard this tanker during all the time?

A. Yes.

Q. Tell us what the S. S. Schenectady is. What is its register?

A. All ships were taken over by the United States Government, all oil tankers, for supply to the Fleet, so, therefore, you were in the Navy area at all times. She was an oil tanker built in San Francisco. [20]

Mr. Wright: I object to that, your Honor, as not being the best evidence, and relates the conclusion of the witness.

The Court: Yes, that may go out.

Q. By Mr. Marcus: This was an American registered vessel, was it not? A. Yes, sir.

Q. During your service on this American registered vessel you were on board the S. S. Schenectady during all these periods you have indicated?

A. Yes, sir.

Q. You never set aboard any other vessel?

A. No, sir.

Mr. Wright: Can't we introduce that record in evidence, counsel? I think it will cover his record. It is his continuous service record.

Mr. Marcus: Shall I read it, your Honor?

The Court: Yes.

Mr. Marcus: (Reading:) Issued by Bureau of Marine Inspection and Navigation.

Name of Seaman, in full, John Delaney.

Statement of age, date of birth 14 November, 1898.

Statement of personal description.

Height, Feet, 5 Inches, 6.

Color of Eyes, Blue, Hair, grey.

Complexion, Fair. [21]

Continuous Discharge Book No. 233972.

Place of birth, New York

Grade 2nd Ass't. Engr., Ocean, any H. P.

The Witness: Any horsepower.

Mr. Marcus: No. A 3330.

Home address of seaman, 725 E. 6th Street, Long Beach 2, California.

Signature of issuing officer P. L. Woodruff, Acting Merchant Marine Inspector, Port of Los Angeles, Calif.

Signature of seaman, John Delaney.

Certification of Discharge.

Name of ship, official number and class.

1. Edwin De Golia, Tanker.

Date and place of engagement, Jan. 5, 1944, San Pedro.

Rating, 2nd. Ass't. Eng.

Description of Voyage, Coast-wise.

Date and place of discharge, Feb. 10, 1944. San Pedro.

Signature of (1) Master; and (2) Shipping Commissioner and official stamp. D. A. Wishmoff.

(Testimony of John Delaney)

2. S. S. Schenectady, 242620. Tanker.

Date and place of engagement, June 6, 1944. San Pedro.

Rating, 2nd. Ass't. Eng.

Description of voyage, Foreign.

Date and place of discharge, May 23, 1945. San Pedro.

Signed W. G. Friar. [22]

I offer this book in evidence.

The Court: In evidence.

The Clerk: Petitioner's Exhibit No. 7.

(The document referred to was marked Petitioner's Exhibit No. 7 and was received in evidence.)

Mr. Marcus: Attached to this book appears the following, which we will ask be included in the same Exhibit:

United States Coast Guard. Certificate of Discharge.
John Delaney. Serial No. G 2622521.

Issued by W. G. Friar.

I hereby certify that the above entries were made by me and are correct and that the signatures hereto were witnessed by me.

Dated this 5th day of June, 1944. W. G. Friar,
Master of Vessel.

Name of seaman, John Delaney.

Citizenship, USA. Certificate of Identification No. ZA330.

Rating, 2nd Ast. Eng.

Date of Shipment, May 16, 1944.

Place of Shipment, San Pedro, Calif.

(Testimony of John Delaney)

Date of Discharge, June 5th, 1944?

Place of Discharge, San Pedro, Calif.

Name of Ship, Schenectady.

Official No. 242620.

Class of Vessel, Steam. [23]

Nature of Voyage, Coastwise.

Passport Division, Customhouse, San Pedro, California.

Received from John Delaney, Date Dec. 27, 1943. One Dollar (\$1.00) with application for seaman's passport.

F. H. Rock, Agent, Department of State.

Note: Passports are issued from Washington, D. C., by the Department of State, about three months after application has been filed. You will receive official notification by mail when your passport has been issued. Bring the notification and this receipt *in person* to obtain passport.

Put that with it, please. I don't know that it has any bearing on it, but I want it in.

Q. How long had you lived in San Pedro, California, Mr. Delaney, prior to 1945?

A. Since 1937.

Q. You had been continuously residing at least in the United States since 1924, as you stated before?

A. Yes.

Q. And in Long Beach since 1937, is that correct?

A. Yes, sir.

Q. What is your address there?

A. I had various addresses there. I moved around to different places.

(Testimony of John Delaney)

Q. The address indicated in this book is 725 East 6th Street, Long Beach? [24] A. Yes.

Q. Was that your residence at the time you shipped aboard the S. S. Schenectady? A. Yes.

Q. When you departed did you leave any property in the United States? A. I left my car.

Q. And your personal effects? A. Yes, sir.

Q. In the United States? A. Yes, sir.

Q. Did you ever vote in the United States?

A. Yes.

Q. When?

A. I voted in Long Beach the last election, but I was away the election before. We were at sea the last election. We couldn't vote.

Q. But you did vote? A. Yes, sir.

Q. For the President of the United States?

A. Yes.

Q. You returned in May, did you,—May or June?

A. Yes, sir.

Q. The record indicates that you returned on the S. S. Schenectady. [25]

A. May 6th., I think it was.

Q. May 23, 1945. Did you get off ship?

A. Yes, sir.

Q. On the 23rd? A. Yes, sir.

Q. Did you go to your home? A. Yes, sir.

Q. Did you stay all night at your home?

A. Yes, sir.

Q. That was in Long Beach? A. Yes, sir.

Q. In the United States?

A. Yes, sir.

(Testimony of John Delaney)

Q. Did you return to the ship the next day?

A. The ship was out in the harbor, sir. We couldn't get any place to dock, so the ship was in the harbor, and I called up the shipping office, at San Pedro, where the ship was. They told me I had to report to the Immigration Station.

Q. When was that? A. The following day.

Q. After you had arrived in the United States, and had resided here overnight? A. Yes, sir.

Q. At your home in Long Beach?

A. Yes, sir. [26]

Q. Then did you go to the United States Immigration Office? A. Yes, sir.

Q. Were you in uniform at that time?

A. Yes, sir.

Q. What happened?

A. They detained me there. They wouldn't let me out.

Q. They took you into custody? A. Yes, sir.

Q. At that time did your uniform indicate your rank as lieutenant? A. Yes, sir.

Q. Then what was done with you?

A. I was there six weeks. I wouldn't be allowed to communicate with no one.

Q. You were where six weeks?

A. In prison.

Q. In other words, you had been in the United States one day. Were you in jail? A. In prison, yes.

Q. You were finally released on a writ of habeas corpus? A. Yes.

Q. You had some hearings down at San Pedro?

A. Yes. [27]

(Testimony of John Delaney)

Q. You requested an attorney to represent you?

A. Yes, sir.

Q. What were you advised?

A. I was refused.

Q. At any time during those proceedings have you ever been permitted the right to have counsel? May it be stipulated that he was refused the right to counsel? The record so indicates it.

Mr. Barber: That is not a fact, your Honor, when you put it that way. The law does not authorize his having counsel during the hearing.

Mr. Marcus: That's for the court to determine. I am going to the unfairness of the hearing.

Mr. Barber: I think we have several citations from United States vs. Ju Toy—

Mr. Marcus: I am not arguing the matter. I asked, would you stipulate he was refused the right of counsel?

The Court: Counsel has modified his suggestion. He was about to state it when you interrupted.

Mr. Wright: I would say that the law did not authorize petitioner to have an attorney present during the Board of Special Inquiry hearing. The law does authorize him to have an attorney on appeal. You were his attorney on appeal. He had consulted with you, and also with another attorney at the conclusion of the Board's hearing. [28]

Mr. Marcus: You will stipulate that he was denied the right to counsel at the proceedings.

The Court: At the hearing.

Mr. Marcus: At the hearing.

The Court: Of the Board of Special Inquiry?

(Testimony of John Delaney)

Mr. Marcus: Of the Board of Special Inquiry.

Q. By Mr. Marcus: Approximately how many hearings did you have, Mr. Delaney?

A. About six hearings.

Q. Before I pass up your foreign voyages, did you ship on any other ships besides the S. S. Schenectady and De Golia? A. No, sir.

Q. Was there a hospital ship you shipped on?

A. Yes, there was a hospital ship. It was the hospital ship Republic.

Q. When was this?

A. I think it was—that was in 1945, December, 1945.

Q. Wasn't that before you shipped on the Schenectady?

A. No, that was after. I was supervising work on the hospital ship at that time; repair work.

Q. For the government?

A. For the government, yes.

Q. Was that after you returned on the Schenectady?

A. After I returned from the Pacific.

Q. Aren't you a bit confused, Mr. Delaney? Didn't they [29] take you into custody the day they returned?

A. Yes, sir.

Q. You couldn't have been on the Republic, could you?

A. After I got released from prison the Army called me back. The A. T. S. called me to attend and supervise on the hospital ship that got damaged at sea. That was why I was assigned to that ship.

Q. Did you ship out?

A. No, sir, only on the steam trial.

(Testimony of John Delaney)

Q. What do you mean by that?

A. Up the coast, San Francisco and Seattle.

Q. Who gave you your orders in connection with that?

A. The A. T. S.,—Army Transport Service.

Q. You took that vessel to sea too?

A. Yes, sir.

Q. Was that torpedoed?

A. I believe after, yes.

Q. When you entered the United States—

The Court: Let us clear up the attorneyship matter. We should clarify that a bit. The government says he was permitted to have counsel, but not at the hearing. Will you clear that up, please?

Q. By Mr. Marcus: Mr. Delaney, the record of the hearing indicates that on May 21, 1945 you had a first hearing before the Board of Special Inquiry, at San Pedro, California? [30] A. Yes, sir.

Q. It also indicates here that the date of your arrival was May 20th, aboard the S. S. Schenectady, is that correct? A. That is correct.

Q. Were you at that time advised that you had a right to counsel, or an attorney at those proceedings?

A. No, sir.

Mr. Marcus: Will you stipulate with me, counsel, that the record indicates he was not advised of his right to counsel at this proceeding?

Mr. Wright: On page 17 of the typewritten transcript, he was not advised of his right to have counsel, because the Board as constituted would not permit him to have counsel, but the court said: You have the right to appeal. He was then advised that he had a

(Testimony of John Delaney)

right to counsel on appeal. I think if you ask the petitioner, he will admit that he consulted with an attorney in San Pedro prior to the time you came into the case.

Mr. Marcus: I am simply asking whether you are willing to stipulate that he was not advised of his right to counsel at the first hearing, on May 21st.

The Court: Counsel answered him by saying it is the position of the government that he was not entitled to one. You are now asking him to stipulate that he was entitled to an attorney, and did not receive one. [31]

Mr. Marcus: My theory is that he was entitled under the constitutional rights to counsel.

The Court: All I am interested in is that you ask the witness when he first contacted counsel.

Q. By Mr. Marcus: Did you have, or advise with an attorney? A. Yes, sir.

Q. Wait a minute—on the date of the first hearing, May 21, 1945? A. No, sir.

Q. You did not advise with an attorney?

A. No, sir.

Q. On that date were you taken into custody?

A. Yes, sir.

Q. Were you lodged in prison in San Pedro?

A. That's right.

Q. How long were you there before you could contact an attorney? A. Around two weeks.

Q. Had you during that period of time requested permission to have counsel?

A. Yes, sir, and I was refused.

Q. Who did you ask?

A. I asked the Chairman of the Board.

(Testimony of John Delaney)

Q. What was his name? [32]

A. Mr. Prooney, I believe, or Cooney.

Mr. Wright: Cooney.

Q. By Mr. Marcus: Do you know Mr. Bennett?

A. Yes, sir.

Q. At any time was he Chairman of the Board?

A. No, sir.

Q. Did you ever ask him for an attorney?

A. Yes, sir.

The Court: What did he say?

The Witness: He said no, that I was not allowed to have an attorney at the hearing.

Q. By Mr. Marcus: Were you advised at the first hearing that you had a right to consult with an attorney at any time?

A. I asked if I was allowed to have one, and they said no.

The Court: You have not answered counsel's question. Read the question.

(Question read by the reporter.)

Q. By Mr. Marcus: At the first hearing were you advised that you had a right to consult with an attorney?

A. No, sir.

Q. The record indicates that a further hearing was held on May 22, 1945, before the same Board. Did you have an attorney represent you at that time? [33]

A. No, sir.

Q. Were you permitted to advise with an attorney at that time? A. No, sir.

Q. The record further indicates that on May 23 you had a further hearing at 1:30 in the afternoon. Were

(Testimony of John Delaney)

you at that time advised that you had a right to confer with an attorney? A. No, sir.

Q. Or had you conferred with an attorney?

A. No, sir.

Q. Did you ask permission from the members of the Board to confer with an attorney? A. Yes, sir.

Q. Were you granted such permission?

A. I was refused, sir.

Q. How long subsequent to this date did you confer with an attorney?

A. When I was in this prison, sir, I had to get word by a friend to consult an attorney. I wouldn't be allowed to use the telephone to call an attorney.

Q. Did you consult with an attorney from Long Beach? A. Yes.

Q. How long after you had the first three hearings I have indicated?

A. That was, I think, about the fourth hearing. [35]

Q. Did you ask permission to have that attorney present at this fourth hearing?

A. No, sir, I asked permission if I could get bail. They told me that I could not get bail to get out; that I would not be released. I did not plead for an attorney at the hearing, because they told me I could not have an attorney at the hearing.

Q. You asked permission to be released from prison on bail? A. Yes, sir.

Q. Who did you ask that of?

A. I asked Mr. Bennett.

Q. The Chairman of the Board? A. Yes, sir.

Q. Was he the Chairman at that time?

A. No, Mr. Cooney was the Chairman of the Board.

(Testimony of John Delaney)

Q. You asked Mr. Bennett? A. Yes.

Q. What did he state to you?

A. He refused.

Mr. Marcus: Will you stipulate to Mr. Bennett's official position at San Pedro?

Mr. Wright: Yes, Mr. Bennett was the officer in charge at San Pedro of the Immigration and Naturalization Service, under the District Director at Los Angeles. [36]

Q. By Mr. Marcus: After you conferred with this attorney in Long Beach, where did this conversation take place?—Did he come to jail to talk to you?

A. Yes, sir.

The Court: What is his name?

The Witness: I don't know his name.

The Court: Have you got it?

Mr. Wright: I think he is referring to Attorney Leonard Di Micelli, at 1008 South Pacific Avenue, San Pedro, California.

Q. By Mr. Marcus: Was any conversation held with Attorney Di Micelli in your presence, with the Immigration officer?

A. Mr. Di Micelli came in to see me, with permission of Mr. Bennett. Mr. Cooney was at the hearing, and told them no attorney was allowed to be at the hearing, so I never saw the attorney any more.

Q. Was that the extent of your advise from counsel?

A. Yes.

Q. You subsequently communicated with another attorney? A. Yes.

Q. Who was that? A. Mr. Marcus.

(Testimony of John Delaney)

Q. I came down to visit you at San Pedro?

A. Yes. [37]

Q. In my presence do you remember a conversation that I had with Mr. Cooney and Mr. Bennett regarding your representation at these hearings, and my request to be permitted to attend those hearings?

A. He refused.

Q. Do you remember if I asked him? A. Yes.

Q. What did he advise me?

A. He said no, no attorney was allowed at the hearings.

Q. Do you remember my likewise requesting that you be permitted to post bond to be released from prison?

A. Yes, sir.

Q. What was the answer at that time? Did he permit you, or grant you permission to post bond for your release from prison? A. Yes, sir.

Q. He did?

A. No, he didn't sir. I think it was you that did it. I am not sure of that.

Q. Do you remember my asking Mr. Bennett and Mr. Cooney that you wanted to be released on bond?

A. Yes.

Q. And he replied he would not permit your release on bond? A. That's right, sir. [38]

Q. Do you remember that subsequently a writ of habeas corpus was issued out of this court?

A. Yes, sir.

Q. For your release on bond? A. Yes, sir.

Q. Do you remember my taking that writ of habeas corpus to Mr. Cooney and Mr. Bennett at Terminal Island? A. Yes, sir.

(Testimony of John Delaney)

Q. In your presence they refused to recognize the writ of habeas corpus?

A. That's right.

Q. And refused your release?

A. That's right, sir.

The Court: Is that in the record?

Mr. Marcus: Yes, your Honor, they had a hearing on that.

Mr. Barber: I think we had a discussion on that. Mr. Marcus indicated that there was some confusion at the Port. Subsequently we had an investigation. That was a matter that would come within the jurisdiction of the Administrative Department. His statement that he was refused release on a writ is incorrect, because the man was released on the writ.

The Court: That is very important to this court, if a writ issued out of the United States Court is going to be repudiated by an officer of the government.

Mr. Wright: Wasn't he produced under the writ? [39]

The Court: I want to be clear on what happened down there. Here is a very serious statement in the record, that an officer of the Immigration Department repudiated a writ of the United States District Court. That is in the record here.

Mr. Wright: In view of the court's interest in that I suggest that the witness testify to the facts. He

(Testimony of John Delaney)

testified to the conclusion, that it was refused. Let us get the facts.

The Court: I want to have the record develop the facts.

Q. By Mr. Marcus: Do you remember my coming to San Pedro with the original writ of habeas corpus?

A. Yes, sir.

Q. And in your presence delivering it to the officer in charge? A. Yes, sir.

Q. And what was done with that writ?

The Court: What was said at that time?

The Witness: He would not recognize the writ.

The Court: Is that what he said?

The Witness: Yes, sir.

The Court: Who said that?

The Witness: Mr. Cooney. I believe it was Mr. Cooney, and Mr. Bennett.

The Court: Did they both say it?

The Witness: Yes, the fact of the matter is that when Mr. Marcus came to the office the second time with the writ, I [40] believe—

The Court: Don't go to the second time. Let us get through with the first time first.

The Witness: When Mr. Marcus came to the office he called for me, and they brought me down there, and

(Testimony of John Delaney)

Mr. Bennett was there and a guard was there at the time, and they refused then.

The Court: Was Mr. Cooney there?

The Witness: Mr. Cooney, yes.

The Court: And Mr. Bennett?

The Witness: Mr. Bennett, yes.

The Court: The first time?

The Witness: Yes.

The Court: Present then were Mr. Cooney, Mr. Bennett, a guard, and Mr. Marcus and yourself?

The Witness: Yes, sir.

The Court: Proceed from there.

The Witness: They refused.

The Court: Not that they refused. What was said? Who spoke? You don't have to give the exact words, but as nearly as you can.

The Witness: Mr. Marcus said he presented a writ of habeas corpus.

The Court: The original writ? What did he do with it? Did he hand it to anybody? [41]

The Witness: Yes, sir.

The Court: Who did he hand it to?

The Witness: Mr. Bennett.

The Court: What did he say when he handed it to him?

The Witness: He would not recognize it.

(Testimony of John Delaney)

The Court: What did Mr. Marcus say when he handed it to Mr. Bennett, if you remember? You don't have to give the exact words.

The Witness: When Mr. Marcus handed it to Mr. Bennett he refused to accept it.

The Court: That is what he said?

The Witness: Yes, sir.

The Court: What was said next? Did he say anything else? Did he give any reason for refusing to accept it?

The Witness: No, sir, he did not. So Mr. Marcus left then, and he came down the next day, I believe, again. I know Mr. Marcus left at that time, and went back.

The Court: Where did you go?

The Witness: I was taken back up to my dormitory, and the next afternoon Mr. Bennett sent a guard for me, that I was to be released on a writ. That was the next day.

The Court: Were you released?

The Witness: Yes, sir.

The Court: Was Mr. Marcus down there then?

The Witness: No, sir. [42]

The Court: Anything further will be developed later.
A recess until 2:00.

(Whereupon, a recess was taken until 2:00 o'clock p. m.) [43]

Los Angeles, California, January 14, 1947, 2:00 o'clock
p. m.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 4591 Civil in the matter of the application of John Delaney for a writ of habeas corpus and for further court hearing.

The Court: Are both sides ready?

Mr. Marcus: Ready.

The Court: Proceed.

Mr. Marcus: Mr. Delaney, take the stand.

JOHN DELANEY,

the witness on the stand at the time of adjournment, being previously duly sworn, resumed the stand and testified further as follows:

Direct Examination.

By Mr. Marcus:

Q. Mr. Delaney, when you called this first attorney to talk to you, will you tell the court how you were permitted to talk with this attorney?

A. Well, Mr. Bennett assigned a guard with me to speak to the attorney; and, therefore, the attorney would not have nothing to do with the case, except he would speak to me alone.

Q. Were you permitted at that time to talk to your attorney alone? [44]

A. No, sir.

Q. Was there a guard present at all times?

A. Yes, sir.

Q. During your conversation with this attorney?

A. Yes, sir.

(Testimony of John Delaney)

Q. Were you permitted to consult with your attorney at that time without the presence of a guard?

A. No, sir.

Q. Who was the guard?

A. Oh, I don't know his name, sir.

Q. What was his position?

The Court: A guard.

The Witness: Well, he was a guard.

Q. By Mr. Marcus: Was he in the service of the Immigration Department?

A. Oh, yes, sir. Yes.

Q. An immigration officer?

A. Immigration officer, yes, sir.

Q. Subsequent to that time when you employed the services of Mr. Marcus to represent you, approximately how many times did he come to visit you?

A. About three times, sir.

Q. Were you at any time of those times permitted to converse or consult with him without the presence of a guard?

A. No, sir. [45]

Q. Was there a guard of the Immigration Service always present during all of the conversations?

A. Yes, sir.

Q. You testified this morning concerning the instance when the writ was brought, the writ of habeas corpus was brought, to the office at San Pedro where you were detained in custody.

Do you remember the circumstances at that time?

A. Yes, sir.

Q. Do you remember what day it was?

Can we stipulate that it was the third day of July that the writ was first presented?

(Testimony of John Delaney)

Mr. Bruce Barber (Immigration and Naturalization Department): Your Honor, I don't think any stipulation is needed there. That matter was taken up with Judge McCormick, and his release was effective on July 5. But that is a matter of record before Judge McCormick.

Mr. Marcus: All right.

Q. Do you remember on July 3rd, on or about July 3rd, that I first appeared there with the writ of habeas corpus? A. Yes, sir.

Q. And is that the instance that you related this morning, that they refused to recognize the writ?

A. Yes, sir.

Q. Your release was subsequently secured on July 5th, [46] was it not? A. That's right, sir.

Q. And you remained in custody two days subsequent to the date that the writ was issued?

A. That is right, sir.

Q. Subsequent to your release there were several hearings at the Immigration Office in San Pedro, were there? A. Yes, sir.

Q. Do you know approximately how many?

A. I would judge around six times, sir.

Q. On any of those occasions were you permitted to have an attorney present? A. No, sir.

Q. And were you residing in the United States at that time? A. Yes, sir.

Q. Did you at any time make a request for permission to have an attorney? A. Yes, sir.

Q. Of your own choosing present at these proceedings? A. Yes, sir.

(Testimony of John Delaney)

Q. Of whom did you make the request?

A. To the chairman of the board.

Q. Who was that?

A. Mr. Cooney and also Mr. Bennett. [47]

Q. What was his reply?

A. They refused. They told me I was not allowed any attorney.

Q. Mr. Delaney, did you ever take the oath of allegiance to the government of the United States?

A. Yes, sir.

Q. When did you do that? A. In 1943.

Q. Under what circumstances? How did you happen to take the oath of allegiance?

A. In joining the reserves, sir, the United States Maritime Reserve.

Q. Now, while you were in the service of the government of the United States, by whom were you paid?

A. We were paid by the United States government. Our checks come from Washington.

Q. Do you remember how these checks were made out, by whom?

A. United States Treasury.

Q. Was that during your entire service with the Maritime Service? A. Yes, sir.

Q. Covering what period of time?

A. Well, I would judge about a year and six months.

Q. Now, in these various trips that you made did you [48] yourself voluntarily make any of the trips from the United States? A. No, sir.

Q. How did you ship?

A. I was assigned to that ship, sir.

(Testimony of John Delaney)

Q. Under what. How were you signed?

A. As engineer of the ship.

Q. No, what, but how were you assigned?

A. Well, the Coast Guard assigned me to the ship to take the ship out.

Q. Did you receive any orders to go out?

A. Yes, sir.

Q. Where did these orders come from?

A. They came from the United States Coast Guard.

Q. Do you know of your own knowledge at that time whether or not the United States Coast Guard was a part of the United States Navy? A. Yes, sir.

Q. Was it? A. Yes, sir.

Q. Do you know what the penalty would be, of your own knowledge, in case you refused to ship when you received your orders? A. Yes, sir.

Q. What? [49]

A. We would be court-martialed in time of war.

Mr. Marcus: You may cross examine.

Mr. Wright: No cross examination, your Honor.

The Court: That is all.

Mr. Marcus: Step down.

(Witness excused.)

Mr. Marcus: Petitioner rests.

Let me suggest this, your Honor: If the court would care to hear any further testimony regarding the question of this writ and this presentation and the refusal of the right of counsel, I can take the stand and testify to those facts.

The Court: I do not care for any.

Mr. Marcus: Very well. Petitioner rests.

Mr. Wright: This is the crew list covering the vessel Schenectady.

The Court: Was there a bond in this case?

Mr. Marcus: Yes, there is, your Honor.

The Court: How much?

Mr. Marcus: \$500. No objection.

Mr. Wright: May this be marked Respondent's Exhibit A?

The Court: Respondent's Exhibit A for identification.

The Court: In the file is the record of the hearing before the Board of Special Inquiry held in San Pedro, California. That is marked Exhibit A. Do I understand that is part of the testimony in this court? [50]

Mr. Wright: Do you know, Mr. Barber, about Exhibit A?

Mr. Barber: That was attached to the supplemental return, your Honor.

The Court: I want to be sure what the record is in the case.

Mr. Barber: I believe, your Honor, that is the first exhibit attached, and that was—

Mr. Wright (Interposing): That is the original return, isn't it?

Mr. Barber: Yes. Now, there will be a duplicate of this complete hearing in the central office file which contains the complete proceedings, including the decisions of the Board of Immigration Appeals and the Commissioner. But at that time the case had not yet reached the Attorney-General, as I recall.

Mr. Wright: Didn't we attach that as an exhibit to the supplemental return?

Mr. Barber: Yes. That whole hearing was attached to the supplemental.

Mr. Marcus: I understand there is another exhibit here of the entire proceedings.

Mr. Wright: Of the entire proceedings, yes. Do you have those, Judge?

The Court: No. Do you mean the final hearing?

Mr. Wright: Yes, your Honor. This is the complete file [51] on the entire proceedings, and it is the big volume of papers here that is attached to the supplemental return.

The Court: Including the Exhibit A that is in the file to which I have called your attention?

Mr. Wright: Yes. That includes this, doesn't it?

Mr. Barber: Yes.

The Court: All right.

Mr. Barber: There is an index on that, your Honor. Those files are rather difficult to get to. We prepared an index on the top referring to the red pencil figures, the lower right-hand corner.

The Court: Yes. The pages are indicated in red. This is part of the evidence to be considered in this case, is it?

Mr. Wright: Yes, your Honor.

The Court: All right, proceed.

Mr. Wright: The respondent now offers in evidence the certified copy of the crew list covering the departure of the vessel Schenectady on June 9, 1944, to which counsel has stated he has no objection.

The Court: The crew list of June 9, 1944?

Mr. Wright: As Exhibit A, Respondent's Exhibit A.

The Court: In evidence, Mr. Cross. You will mark this as Respondent's Exhibit B in the file.

The Clerk: This will be Respondent's Exhibit B.

The Court: Let me see Respondent's Exhibit A, please. [52]

(Document handed to the court.)

Mr. Wright: You are marking the return, Mr. Cross, but I guess it is all right.

The Court: Isn't that part of it?

Mr. Wright: Yes, the whole file.

The Clerk: Yes.

The Court: What is the point with reference to Exhibit A, the list? Is the point there that it does not show the petitioner is a member of that ship's crew?

Mr. Wright: It shows, your Honor, that the vessel was operated by a commercial company, that Deconhil Shipping Company as an agent of the Maritime Commission—the War Shipping Administration, I should say—and on line 21 appears the name of the petitioner here.

Mr. Marcus: Do I understand that that Crew list—

The Court (Interposing): Line 21 has the name of John Delaney. This is a very poor copy.

Mr. Wright: Line 21?

The Court: 21. Yes, line 21 has the name of John Delaney, No. 233972; birth place: New York.

It has a date on it in that column "Citizen or subject of" but what the date is is indistinct. "Age, 45."

Mr. Wright: Under the column headed "Citizen or subject of"

The Court: Yes. [53]

Mr. Wright: Yes. Above that date is "U. S. A." on line 15.

The Court: Well, then, there is another line—

Mr. Wright (Interposing): Line 19.

The Court: Yes. What is that?

Mr. Wright: There is a percentage mark, apparently a typographical error.

The Court: That is what I wanted to clear up. "Age, 45; five feet six. Description: Complexion . . ." and after the name "John Delaney" is "Lieutenant, Hair, Brown," I guess. It has a ditto above it. "Capacity, second assistant engineer."

Mr. Wright: Engineer.

The Court: "Name and address of next of kin," referring to John Delaney again, it is very indistinct.

Mr. Wright: "Co."

The Court: What?

Mr. Wright: "Co" for cousin.

The Court: "Co" and another letter.

Mr. Wright: "R. McArdle."

The Court: After the "Co" I see another letter.

Mr. Wright: "Co:"

The Court: "R. McArdle," M-c-A-r-d-l-e.

Now, is that 725 East Sixth Street, Long Beach, California? [54]

Mr. Wright: Yes.

The Court: "Owned and operated by Deconhil Shipping Co., agents for War Shipping Administration. Bound from Los Angeles, California, June 9th, 1944, to Foreign," without any other designation. "The following composed the crew: . . ."

Then as we have stated already on line 21 is the name of the petitioner in this case.

I assume that is the petitioner. Is there any dispute about it?

Mr. Marcus: There is no question about that.

The Court: No dispute about that?

Mr. Wright: No question about that, your Honor.

The Court: Is there, counsel?

Mr. Marcus: No, none.

The Court: All right, proceed, gentlemen.

Mr. Marcus: May it be stipulated, counsel, that Mr. Delaney has no criminal record? You have the FBI report.

Mr. Barber: There is not in the deportation hearing.

The Court: Probably the government could not go that far, but it could go far enough to say that the report they have does not show any. But that may not be accurate.

Mr. Barber: Yes, I have reviewed the record; and so far as the record shows there is no criminal record.

The Court: That is as far as you could ask the govern- [55] ment to go. All right.

Mr. Wright: Respondent rests, your Honor.

The Court: All right.

Mr. Marcus: No rebuttal.

The Court: All right. The matter is under submission, gentlemen.

Does the government desire to furnish the court some authorities with reference to the new point developed today on the statute of limitations?

Mr. Wright: I think that would be in order, your Honor; and I should be very happy to do that.

Perhaps in view of the fact that counsel held that one out until today and sprung it in court, it might save any further confusion if counsel would file a brief and counsel for the petitioner his final brief, and we could answer that. And I think then we would have before the court the complete statement of the position of both sides here.

Mr. Marcus: Will you read that first statement of counsel?

(Record read by the reporter.)

Mr. Marcus: Your Honor, this brief prepared and filed on behalf of the Immigration Department was done

by Mr. Barber of the Immigration Department. In answer to that insinuating remark, I want counsel to know that Mr. Barber and I conversed not today but approximately 10 days ago and we [56] discussed both of these cases in his office. It was not sprung today, and I gave him the citation and left them there at his office.

Mr. Wright: This is the first I have heard of it, your Honor. Of course, the United States Attorney is of record here, and when the matter comes up in court I know nothing about it until it is, as I say, sprung here for the first time so far as I have any information.

The Court: Well, the record is clear on that. Many times counsel find a case at the last minute or even after a case is under submission, and it is proper to send a copy of it to opposing counsel and a copy of it to the court.

Mr. Wright: I do not want to be understood to be insinuating anything.

The Court: There was not any insinuation in it.

Mr. Wright: I want to say expressly that I have felt the court would have a better picture if he had two briefs here.

The Court: I remember in the opinion I prepared in the Chaplin case with reference to the municipal judge in Beverly Hills, and planning to deliver the opinion on Monday morning I read all the briefs of counsel; and in researching the matter on Sunday I found a decision that all counsel had overlooked that was very important in the case.

I had no time to give it to either the government or [57] the other side. Of course, I put it in my opinion. But it just came down on Friday, the Friday prior to the Monday.

I think that is a good suggestion. It is an important case. Whenever we have a case involving the liberty of an individual, there is nothing that should be guarded more carefully by the courts.

How much time? You are very familiar with this case. Mr. Marcus, how much time do you want?

Mr. Marcus: Would 10 days be too much, your Honor?

The Court: I think we can get it cleared up. Let me look at my calendar and see if that runs into too many Saturdays or holidays.

January 22nd, the government to January 29th, and if Mr. Marcus desires to make a reply, February 4th.

It will be submitted, gentlemen. Court is in recess.

Mr. Marcus: Your Honor, may I ask the court's indulgence for a moment? I will say it this way, not anticipating the court's opinion in the matter, but assuming that it may be or is adverse to the petitioner here, may we have a stay of execution on it so that we could perfect our record in the event it is?

The Court: Yes, 10 days.

Mr. Marcus: Very well.

The Court: Court is in recess.

(Whereupon, at 3:30 o'clock p. m., the hearing in the above-entitled matter closed.)

[Endorsed]: Filed Sep. 24, 1947. Edmund L. Smith, Clerk. [58]

[Endorsed]: No. 11748. United States Circuit Court of Appeals for the Ninth Circuit. William A. Carmichael, District Director, United States Department of Justice, Immigration and Naturalization Service, District No. 16, Appellant, vs. John Delaney, Appellee. Transcript of Record, Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 3, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11748

WILLIAM A. CARMICHAEL, District Director, etc.,
Appellant,

v.

JOHN DELANEY,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON APPEAL

Appellant designates the following point on which he
intends to rely on appeal in this case:

The determination of the Board of Special Inquiry affirmed by the Board of Immigration Appeals, is not open to review by the United States District Court on a Writ of Habeas Corpus.

JAMES M. CARTER

U. S. Attorney

RONALD WALKER

Assistant U. S. Attorney

ROBERT E. WRIGHT

Assistant U. S. Attorney

Attorneys for Appellant

Received a copy October 9, 1947. David C. Marcus,
Attorney for Appellee.

[Endorsed]: Filed Oct. 10, 1947. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION

It is stipulated that none of the exhibits introduced by either party at the trial need be reproduced and printed as a part of the record, and the attorneys representing the parties hereto join in the request that all the exhibits, viz.: petitioner's Exhibits 1, 2, 3, 4, 5, 6 and 7, and respondent's Exhibits A and B, may be considered in their original form.

JAMES M. CARTER

U. S. Attorney

RONALD WALKER

Assistant U. S. Attorney

ROBERT E. WRIGHT

Assistant U. S. Attorney

Attorneys for Appellant

DAVID C. MARCUS

Attorney for Appellee

So Ordered:

FRANCIS A. GARRECHT

Senior United States Circuit Judge

[Endorsed]: Filed Nov. 25, 1947. Paul P. O'Brien,
Clerk.

No. 11748

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. CARMICHAEL, District Director, United
States Department of Justice, Immigration and Nat-
uralization Service, District No. 16,

Appellant,

vs.

JOHN DELANEY,

Appellee.

APPELLANT'S BRIEF.

JAMES M. CARTER,
United States Attorney;

RONALD WALKER,
CLYDE C. DOWNING,
*Assistant United States
Attorneys,*

United States Postoffice and
Courthouse Building, Los Angeles 12,
Attorneys for Appellant.

BRUCE G. BARBER,
*District Adjudications Officer,
Immigration and Naturali-
zation Service,*
458 South Spring Street,
Los Angeles 13,

On the Brief.

TOPICAL INDEX.

	PAGE
Jurisdiction	1
Statutes and regulations involved.....	2
Statement of the case.....	5
Summary of facts.....	6
Summary of argument	19
Argument	21
Point I. The determination of the Board of Special inquiry affirmed by the Board of Immigration Appeals is not open to review by the United States District Court on a writ of habeas corpus.....	21
Applicable statutes	21
Was there any substantial evidence to support the finding of the Board of Immigration Appeals?.....	24
The District Court may not substitute its opinion for that of the Immigration Board on the question of credibility of the evidence.....	26
Should the proceeding have been under the authority to deport rather than to exclude in this case?.....	30
Point II. An "arrival" from a foreign port or place was made by appellee upon his return to the Port of San Pedro, California, on May 20, 1945, aboard the oil tanker "Schenectady"	35
After touching at various foreign ports in the South Pacific an "entry" has been made within the contemplation of the immigration laws, notwithstanding the fact that appellee was a reserve officer of the U. S. Maritime Service and that the vessel was being operated by the Deconhil Shipping Company, as agents of the War Shipping Administration, on this voyage	35

Appendix:

Partial Index to the Immigration and Naturalization Service File #5509810 T 1 [R. 55, 98, 99].....	39
Numerical Index showing the consecutive typewritten numbers of the Record of Transcript of the Proceedings Before the Board of Special Inquiry as they appear in the Immigration and Naturalization Service file as indicated therein by the red penciled page numbers [R. 55, 98, 99].....	40
Table of numbered exhibits introduced into evidence before the Board of Special Inquiry showing the red penciled figure page numbers where the exhibit appears in the Immigration and Naturalization Service file and where the exhibit was accepted into evidence and referred to in the testimony	42

iii.

TABLE OF AUTHORITIES CITED

CASES	PAGE
Delaney, Ex parte, 72 F. Supp. 312.....	20
Delgadillo v. Carmichael, 33 U. S., 68 S. Ct. 10.....	20, 37
Delgadillo v. Carmichael, 333 S., 68 S. Ct. 10.....	35
Di Pasquale v. Karnuth, 158 F. (2d) 878.....	36
Jacobs v. Prichard, 32 S. Ct. 289, 223 U. S. 200, 56 L. Ed. 731	34
Lee Chock Hon v. Proctor, 112 F. (2d) 246.....	24
Moy Chee Chong v. Weedon, 28 F. (2d) 263.....	34
Nishimura Ekiu v. United States, 12 S. Ct. 336, 142 U. S. 651, 35 L. Ed. 1146.....	31
Quon Quon Poy v. Johnson, 47 S. Ct. 346, 273 U. S. 352, 71 L. Ed. 680.....	23
Smith case, 289 U. S. 425, 53 S. Ct. 667, 77 L. Ed. 1298.....	35
Tang Tun v. Edsell, 32 S. Ct. 359, 23 U. S. 673, 56 L. Ed. 606	23
United States v. Ju Toy, 25 S. Ct. 644, 198 U. S. 253, 49 L. Ed. 1040	22
United States v. Karnuth, 74 F. Supp. 657.....	31
United States v. Cerecedo, 28 S. Ct. 532, 209 U. S. 337, 52 L. Ed. 821	34
United States v. Tod, 44 S. Ct. 54, 263 U. S. 149, 68 L. Ed. 221	30
United States v. Watkin, 164 F. (2d) 457.....	36
Vajtauer v. Commissioner, 273 U. S. 103, 47 S. Ct. 302, 71 L. Ed. 560.....	25
Wienke, Ex parte, 31 F. Supp. 733.....	24

STATUTES

Code of Federal Regulations, Title 8, Sec. 120.3.....	3
Code of Federal Regulations, Title 8, Sec. 120.17.....	3
Code of Federal Regulations, Title 8, Sec. 130.2.....	4
Code of Federal Regulations, Title 8, Sec. 136.1.....	5

	PAGE
Immigration Act of February 5, 1917, Sec. 1 (39 Stat. 874; 8 U. S. C. A. 173).....	3
Immigration Act of February 5, 1917, Sec. 15 (39 Stat. 885; 8 U. S. C. 151).....	2, 30, 34
Immigration Act of February 5, 1917, Sec. 16 (39 Stat. 885- 887; 8 U. S. C. 152).....	3
Immigration Act of February 5, 1917, Sec. 17 (39 Stat. 887; 8 U. S. C. A. 153).....	2, 4, 21, 30, 31
Immigration Act of February 5, 1917, Sec. 19(a) (39 Stat. 889, 8 U. S. C. A. 155).....	31
Revised Statutes, Sec. 752, Feb. 13, 1925, Chap. 229, Sec. 6, 43 Stat. 940 (28 U. S. C. A. 452).....	1
United States Code Annotated, Title 28, Sec. 463(a).....	1

No. 11748

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. CARMICHAEL, District Director, United
States Department of Justice, Immigration and Nat-
uralization Service, District No. 16,

Appellant,

vs.

JOHN DELANEY,

Appellee.

APPELLANT'S BRIEF.

Jurisdiction.

The United States District Court for the Southern District of California had jurisdiction of the writ of habeas corpus proceeding under Section 752, R. S. February 13, 1925, C. 229, Section 6, 43 Stat. 940 (28 U. S. C. A. 452). The appellee was being held in the custody of the appellant in the County of Los Angeles, State of California, within the jurisdiction of the District Court. This Court has jurisdiction of the appeal under Section 463(a) of Title 28 U. S. C. A.

Statutes and Regulations Involved.

By Section 17 of the Immigration Act of February 5, 1917 (39 Stat. 887; 8 U. S. C. A. 153) Congress provided for the setting up of Immigration Boards of Special Inquiry, composed of members of the Immigration and Naturalization Service, and authorized such Boards to determine the admissibility of any alien seeking entry into the United States:

“Such Boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported * * * in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, *the decision of a Board of Special Inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General.*” (Emphasis added.)

By Section 15 of the Immigration Act of February 5, 1917 (39 Stat. 885; 8 U. S. C. 151) Congress provided for the inspection of aliens arriving on vessels and that temporary removal for such examination would not constitute a “landing”:

“That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the duty of the proper immigration officials to go or send competent assistants to the vessels and there inspect all such aliens or said immigration officials may order a temporary removal of such aliens for examination at a designated time and place, *but such temporary removal shall not be considered a landing* * * *” (Emphasis added.)

By Section 16 of the Immigration Act of February 5, 1917 (39 Stat. 885-887; 8 U. S. C. 152) Congress provided for the examination of all aliens arriving in the United States and authorized immigrant inspectors to board and search for aliens any vessel in which they believed aliens are being brought into the United States:

“All aliens arriving at port of the United States shall be examined * * * Immigrant Inspectors are hereby authorized and empowered to board and search for aliens any vessels * * * in which they believe aliens are being brought into the United States.”

By Section 1 of the Immigration Act of February 5, 1917 (39 Stat. 874; 8 U. S. C. A. 173) Congress defined the term “seaman” as follows:

“* * * that the term ‘seaman’ as used in this Act shall include every person signed on the ship’s article and employed in any capacity on board any vessel arriving in the United States from any foreign port or place.”

The inspection of seamen is further provided for by regulation as set forth in Section 120.17, Title 8, Code of Federal Regulations:

“In addition to the medical examination hereinafter provided for, all seamen arriving in ports of the United States shall be regularly inspected by immigrant inspectors.”

“Arriving from any foreign port or place” is defined by Section 120.3, Title 8, Code of Federal Regulations, as follows:

“‘Arriving in the United States from any foreign port or place’ means arriving in ‘the United States,

and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone,' *from any port or place in a foreign country or in the Canal Zone* (Secs. 1, 19, 31, and 33 to 36 of the Immigration Act of February 5, 1917); (39 Stat. 874 ff.); (8 U. S. C. 173, 155, 165, 166, 168, 169, 171). * * *” (Emphasis added.)

Section 17, Act of February 5, 1917 (39 Stat. 887; 8 U. S. C. A. 153) and regulations made thereunder, in effect at the time of the instant proceedings, did not authorize the appellee to be represented by an attorney at the hearing before the Board of Special Inquiry except in the capacity of a friend or relative. Representation on appeal to the Attorney General from an adverse decision of the Board of Special Inquiry is authorized.

“All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Attorney General.”

The regulation made in pursuance of the above Act of Congress is found in Title 8, Code of Federal Regulations, Sec. 130.2, and provides with respect to representation by attorney that:

“Hearing before the board ‘shall be separate and apart from the public’; but the alien may have one friend or relative present after the preliminary part of the hearing has been completed; *provided, first, that such friend or relative is not and will not be employed by him as counsel or attorney*; * * * that he is not an agent or a representative at any immigration station of an immigrant aid or other

similar society or organization; and * * * that he is either actually related to or an acquaintance of the alien.” (Emphasis added.)

Representation by an attorney on appeal is provided for by regulation found in Title 8, Code of Federal Regulations, Sec. 136.1:

“An alien desiring to appeal may do so individually or through * * * any relative or friend or through any person, including attorneys permitted to practice before the immigration authorities.”

Statement of the Case.

Petition for writ of habeas corpus was filed in the United States District Court for the Southern District of California, Central Division, on July 3, 1945 [R. 2-6, 616].¹

Petition for the writ of habeas corpus was granted and made returnable on July 9, 1945 [R. 16].

Subject was released under court bond in the amount of Five Hundred Dollars on July 5, 1945 [R. 94].

Return to the writ was filed July 7, 1945 [R. 7-10, 16-17] and supplemental return was filed on December 20, 1946 [R. 17].

Traverse was filed on December 28, 1948 [R. 11-15, 17].

On January 14, 1947, the Court heard testimony on the petition for the writ and took the matter under submission [R. 59-103], on briefs to be filed [R. 17, 101, 103].

¹The references herein preceded by “R” are to the printed record on appeal.

The District Judge granted the writ and discharged the petitioner from technical custody and filed his opinion on February 21, 1947 [R. 16-45].

On May 28, 1947, findings of fact and conclusions of law were filed [R. 46-51] together with judgment [R. 52, 53].

Notice of appeal was filed on August 25, 1947 [R. 54].

Stipulation for the substitution of the party respondent was duly filed on September 26, 1947 [R. 57].

Summary of Facts.

Appellee denies that he is an alien and that he was born in Cork, Ireland [INS File 248].² He claims United States citizenship and that he acquired such citizenship through birth in Brooklyn, New York [INS File 254].

Appellee arrived at the port of San Pedro, California, aboard the vessel "Schenectady" on May 20, 1945, as a member of the crew serving in the capacity of Second Assistant Engineer [R. 10, 76, 98, 99, 100]. The "Schenectady" was a commercial oil tanker owned and operated by the Deconhil Shipping Company, as agents for the War Shipping Administration [R. 99, 100]. The appellee was returning from a continuous voyage which began with the departure of the vessel "Schenectady" from the port of San Pedro on June 10, 1944 [R. 20, 98, 100]. The crew list described the voyage as "foreign"

²The references herein preceded by "INS File" are to the Immigration and Naturalization Service record containing the complete report of the Board of Special Inquiry, the decisions of the Commissioner and the Board of Immigration Appeals relating to the exclusion of the appellee and to the page numbers indicated therein by red pencil figures [R. 55].

[R. 100]. The appellee's continuous discharge book also described the voyage as "foreign" [R. 76].

Appellee testified that the vessel "Schenectady" touched at various foreign ports in the South Pacific [R. 69, 70, 71; INS File 222], supplying oil to the British and United States Fleets through the "mother ship" or "store ship" "in port: wherever we could find her: wherever she would meet us": but "not on the high seas" [R. 71]. Appellee presented certain certificates of the Maritime Service confirming his service with the United States Merchant Marine in the war area, including the Pacific War Zone Bar, Merchant Marine Combat Bar, Mediterranean Middle East War Zone Bar, and also the Atlantic War Zone Bar [R. 73].

The "Schenectady" was boarded by an Immigrant Inspector of the Immigration and Naturalization Service upon its return to San Pedro, California, on May 20, 1945 [R. 7, 9, 10]. Appellee signed and swore to a statement before the inspector on the date of the arrival of the vessel on May 20, 1945, that he was a citizen of the United States, and that he had been born in Brooklyn, New York, on November 14, 1898 [INS File, Ex. 8, 176, 244]. The inspector was in possession of a copy of the appellee's alien registration record executed December 16, 1940 [R. 24; INS File, Ex. 2, 182] wherein he had claimed British nationality and that he had been born in Cork, Ireland, on November 14, 1897, and had first entered the United States on November 14, 1924, aboard the vessel "Nehian" [R. 7, 24; INS File, Ex. 2, 182, 251, 252]. There is no testimony as to the conversation between the Immigrant Inspector and the appellee upon the date of his arrival on May 20, 1945. He did, however, admit that he signed an "Oath of Return-

ing Citizen” before an Immigrant Inspector on the date of his arrival [INS File, Ex. 8, 176, 244]. On the same date of the arrival of the vessel the “Schenectady” an Immigrant Inspector of the Immigration and Naturalization Service served on the master of the vessel a notice and order to deliver the appellee to the Immigration Office, Terminal Island, for further examination [R. 7, 9, 10, 21, 22].

Before the District Court on January 14, 1947 appellee testified that upon the arrival of the vessel “Schenectady” on May 20, 1945 at San Pedro he had been permitted by the captain of the vessel to go ashore and remained in Long Beach, California, overnight and that it was not until the following day (May 21, 1945) that he was notified by the officers of the vessel that he was to report to the Office of the Immigration and Naturalization Service, Terminal Island [R. 22, 78, 79].

At a hearing before a Board of Special Inquiry at the Office of the Immigration and Naturalization Service, Terminal Island, on May 21, 1945, appellee admitted that he registered at the Post Office, Long Beach, California, as an alien on December 16, 1940, and that when so registering he claimed British citizenship; that he had been born in Cork, Island, on November 14, 1897, and that he had last and first entered the United States on the vessel “Nehian” at Wilmington, North Carolina, on “November 14, 1924”; that he had applied for naturalization on “December 13, 1924” but had not received his first papers; that he had been in the “British Navy” [INS File, Ex. 2, 182, 252, 251]. Appellee explained that he had registered as an alien because he had asked several people for advice since he could get no proof of his birth in New York and they told him, “The best thing I

could do was to go and register at the post office" [INS File 252, 248].

At the time appellee registered as an alien on December 16, 1940 he was employed at the Craig Shipyards. When he secured employment with the Craig Shipyards on October 2, 1940 he represented himself to be a United States citizen [INS File 301, 300].

Appellee admitted that when applying for his engineer's license and Coast Guard card he had submitted the affidavits of William Giles and Kenneth Higgins as proof of his birth in the United States [INS File, Ex. 3, 181, 245; Ex. 4, 180, 245]. Appellee further testified before the Board of Special Inquiry that he first met Kenneth L. Higgins about 1945, and that he had known Mr. William Giles from about 1932 or 1933, and that neither Mr. Higgins nor Mr. Giles knew his parents [INS File 241]. In explanation of Mr. Higgins' statement that he did not know he was signing an affidavit of birth but that he thought it was a reference, appellee testified, "Well, maybe he did—didn't know—I told him I had to get a reference in regard to getting my birth certificate, yes" [INS File, Ex. 9, 175-171, 244]. The address "423 Main Street, Long Beach", shown as the address of William Giles in his affidavit, was found to be nonexistent [INS File 232]. Appellee admitted that he had signed the name "William Giles" to the affidavit purporting to be the affidavit of William Giles certifying to appellee's birth in the United States. This latter testimony is quoted as follows [INS File, Ex. 3, 181, 245, 212]:

"Q. You had a Mr. William Giles and a Mr. Kenneth L. Higgins execute affidavits in support of your birth in the United States. Did either of those men of their own personal knowledge know of your

birth in the United States? A. No, only what I told them.

Q. Is William Giles an educated man? A. I guess he is. He's a pretty old man, around 65.

Q. Is he able to sign his name? A. Oh, I guess so—oh, yes.

Q. Did he sign his name to this affidavit [Ex. "3"]? A. No, he was sick at the time, and he gave me the power of attorney to go ahead and sign his name for him.

Q. Then did you write the name of William Giles on this affidavit [Ex. "3"] before a notary public on September 29, 1943? A. Did I? Yes.

Q. Did you show the notary public a power of attorney authorizing you to sign the name of William Giles? A. Yes.

Q. Where is that power of attorney? A. It was merely a verbal power of attorney."

Appellee gave the following testimony concerning where he believed he had been born [INS File 248, 246]:

"Q. Did you ever really think that you were born in Cork, Ireland? A. No.

Q. When did you first begin to believe that you were born in Brooklyn, New York? A. In 1941, when I wrote to Philadelphia regarding my parents' naturalization. I got no answer. Then I wrote to the Marriage License Bureau and got a record of my parents' marriage.

Q. Then before 1941 you were in doubt as to the place of your birth? A. Yes.

Q. Well, when did you first get the idea that you were born in Brooklyn, New York? A. Way back when my foster mother took me back to Ireland. I

do remember that when my father put me in school he registered me as a citizen of the United States.

Q. What schools did you attend in Ireland? A. The national school Shambaley, County Cork, and Carragline national school in County Cork."

Investigation was conducted through the United States Consular Service in Ireland [INS File, Ex. 20, 321, 306]. Examination of the school registry of the Carrigaline Boys School in Ireland for the period January 12, 1891 to February 4, 1920 showed only two entries bearing the surname "Delaney", one "John Delaney" and the other "Jeremiah", brother of John. Although appellee testified he had gone to this school as a boy, he denied that such record related to him because he stated he had no brothers [INS File 234].

A birth record was located showing the birth of a John Delaney on October 13, 1897, at Belrose, Bandon, County Cork, the son of Jeremiah and Helena Delaney, nee Hawks. Appellee denied that this record related to his birth or that the names of the parents shown therein referred to his parents [INS File, Ex. 20, 321, 306].

Appellee admits that information shown on copy of manifest of the British vessel "Ninian" covering its arrival at Wilmington, North Carolina, on November 17, 1924 from Manchester, England, referring to "John Delaney", relates to appellee's arrival as a seaman on the said vessel and that he supplied the information that his nationality was British, his race Irish, and that he was twenty-eight years of age when he shipped on that vessel on October 27, 1924 [R. 25, 26; INS File, Ex. 1, 183, 252].

Appellee remained in the United States as a "deserting seaman" upon the occasion of the arrival of the vessel "Ninian" on November 17, 1924 [INS File, Ex. 1, 183, 252, 201] and continued to reside in the United States until his departure on the oil tanker "Schenectady" on June 10, 1944 [INS File 221].

Appellee stated he had shipped out of the United States in the early part of 1924 and that he had missed his vessel on its return from Liverpool, England, and that he had gone to Manchester, England, and shipped as a seaman on the vessel "Ninian" on which vessel he arrived in the United States on November 17, 1924 [INS File 222].

Appellee explained that he had given the information that his nationality was British when signing on the vessel "Ninian" at Manchester, England, on October 27, 1924 because "They wouldn't hire American citizens" [INS File 253, 254].

Appellee testified that he had never obtained an immigration visa from an American Consul or paid a head tax as an alien when entering the United States [INS File 243].

Appellee admitted employment by the United States Coast and Geodetic Survey and that copy of "Notice of Shipment" of that agency, dated November 18, 1924, related to his enlistment with such agency for the period November 18, 1924 to the time of his discharge on April 28, 1925 at Jacksonville, Florida. This document shows signature "J. Delaney", "next of kin—mother, Mary Delaney, Cork, Ireland", and that appellee was born at "Cork, Ire." on "January 14, 1897", "citizenship, alien", "intention declared" [INS File, Ex. 13, 167, 201, 202, 233].

He further admitted that copy of a document entitled "Discharge from the United States Coast and Geodetic Survey", showing "J. Delaney" had served aboard the United States Coast and Geodetic Survey vessel "Lydonia" and had been discharged on April 28, 1925, related to him. This document shows appellee to have been born in "Cork, Ireland", giving his height as "five feet six", color of hair "red" [INS File, Ex. 14, 166, 199, 201].

While appellee admits that the above two records of the United States Coast and Geodetic Survey relate to him, he denies that he claimed to have been born in Ireland, but claims that such information was copied from his discharge papers which he received from the vessel "Ninian" [INS File 202, 201].

Appellee claimed to have been in the United States during the First World War. A draft registration card was found in the name of "John Patrick Delaney", signed "John P. Delaney", giving description of registrant as "tall", "blond hair", and showing birth in the United States on September 28, 1897. Appellee first testified that he filled out his draft registration form himself and that he had signed it. He further testified that he had never used the name of "Patrick". He later testified that he believed the form was filled out by someone else and attributed the discrepancies of "tall" and "blond hair" and birth date and middle name to that circumstance. Notwithstanding the discrepancies, appellee testified that he believed the record related to him [INS File, Ex. 18, 162, 192, 191, 189, 188, 187].

The names "John Patrick Delaney" and "John P. Delaney" were written by appellee and comparison was made by the Board members with the signature and description

on the draft registration, as against the signature and description of appellee appearing on "Notice of Ship-ment" form of the United States Coast and Geodetic Survey Service, made on November 18, 1924 [INS File, Ex. 18, 162; Ex. 19, 161, 189; and Ex. 13, 167, 201]. The Board of Special Inquiry concluded that because of the lack of similarity in the description and signatures the Draft Registration record does not relate to appellee [INS File 186].

Appellee presented copy of marriage record of the Philadelphia, Pennsylvania, Department of Public Health, issued December 1, 1943, certifying to the marriage of "M. Delaney" to "Bridget Whalen" on October 22, 1896, and testified that it related to the marriage of his parents. He first testified that his mother's name was "Margaret", but later changed and said that her name was "Bridget" [INS File, Ex. 17, 163, 193]. He testified that he knew his parents were married in Philadelphia because his father told him that when appellee was a boy. Further, that he had secured a copy of their marriage record in 1938 or 1937 when some lawyer had told him that if he could get a copy of their marriage record that would make him a citizen [INS File 203].

Appellee admitted requesting the Social Security Board on July 26, 1943 to correct his record with that agency to show his date of birth as "November 14, 1898"; birth-place, "Brooklyn, New York"; mother's maiden name as "Mary Grady"; and father's name as "Michael John Delaney". He explained that "Mary Grady" was his step-mother and that he should have given the name of his mother [INS File, Ex. 11, 169, 204; Ex. 12, 168, 204, 189].

Extensive investigation was conducted in New York by the Immigration and Naturalization Service to locate employment or other records relating to the appellee or persons who knew the appellee. The appellee testified that he had been employed by the Morse Dry Dock Company and the Tebos Company, but when confronted with an employment record showing the following information he disclaimed that such record related to him [INS File, Ex. 22, 315, 304.] :

“We have an ‘application for employment,’ Morse Dry Dock and Repair Company, dated September 10, 1926. This John Delaney gave his address as 169—23rd Street, Brooklyn, N. Y., his age as twenty-nine, and single. According to the application he was born in Ireland and had taken out first papers in Jacksonville, Florida, 1924. This Mr. Delaney gave Tebos as his last employer, from 1925 to 1926, and his occupation as a burner. Robbins is listed as his employer in 1924.”

Appellee testified that he has never been married [INS File 217]; that he has no living relatives unless it be a half-sister who may still be living in Ireland but he doesn't know her whereabouts [INS File 235]. He admits that Rosemary McArdle, listed as his cousin on departure manifest of the “Schenectady” is no relation to him; that he merely listed her as his next of kin in the event something happened to him on his voyage beginning June 10, 1944 [INS File 216].

Appellee testified that his mother died when he was a week old, he believes in Brooklyn, New York, and he does not know where she is buried; that he had been taken to Ireland from the United States by his step-mother when he was two or three years old [INS File 236, 210]; and that he had returned to the United States when he

was about fifteen or sixteen on the vessel "John Ludgate." A search for the arrival records of this vessel during the period 1913 to 1917 fails to disclose a record of the appellee's claimed arrival [INS File, Ex. 10, 170, 230, 233].

In response to the question "Where were you residing in the year 1920 when the census was taken," appellee replied, "I was at sea" [INS File 241].

Appellee testified his father was born in Cork, Ireland. Relative to his father's possible naturalization he testified on May 21, 1945, as follows [INS File 254]:

"Q. Of what country was he a citizen? A. To the best of my belief he was a citizen of this country when he died.

Q. Did your father naturalize in the United States? A. That I don't know. I couldn't say.

Q. When did he come to the United States? A. That I don't know either.

Q. How long did he live in the United States? A. As far as I know he lived here many years, I think.

Q. When and where did your father die? A. In Ireland—I don't know when."

On May 22, 1945, appellee had the following to say regarding his father's naturalization [INS File 246, 241]:

"Q. Did your father ever tell you that he had naturalized in the United States? A. Yes.

Q. When did he tell you this? A. When I went to school. He had to give that record at school—that he was an American citizen.

Q. Did he tell you when and where he naturalized in this country? A. To the best of my knowledge he said Philadelphia.

Q. Do you know where your father lived in Philadelphia? A. No. I tried to remember those streets, but I can't remember.

Q. Did you ever see his naturalization papers?
A. No.

Q. Do you know in what court in Philadelphia your father may have naturalized? A. No.

Q. Do you know the names of the persons who appeared as witnesses for him? A. No.

Q. Can you give us any information which might help to locate a record of your father's alleged naturalization? A. No, I can't."

With respect to the citizenship of his mother, appellee testified as follows [INS File 254, 246]:

"Q. What was your mother's name and where was she born? A. She was born in Ireland. Her name was Margaret Whalen.

Q. Did she ever live in the United States? A. Yes.

Q. Did she become a citizen of the United States? A. Well, I guess so.

Q. When and where did she die? A. She died in Philadelphia, Pennsylvania. I think it was in Pennsylvania anyway. I don't know when she died.

Q. * * * do you know how she acquired citizenship? A. I guess through her brother. I guess she was naturalized here.

Q. Do you know when and where? A. In Philadelphia, as far as I know. I don't know the date."

Appellee gave the following testimony with reference to service in the British Navy [INS File 214, Ex. 9, 175-171, 244]:

"Q. On your alien registration record you list military service with the British Navy; when did you serve in the British Navy? A. I never did serve in the British Navy; that was a reference that I put down there.

Q. Why did you give the British Navy as a reference? A. Well, I had nothing else to give. I had to give some reference and I didn't think of anything else to give."

When confronted with the admission to the witness Kenneth L. Higgins, asserted to have been made by appellee regarding his British Naval Service, appellee replied: "He said I was an apprentice in the King's Navy. I never said anything like that. It was the first time I ever heard of that."

"Q. Did you ever serve in any foreign army or navy? A. No."

Further, appellee testified before the Board of Special Inquiry on May 21, 1945, that he had never served in the United States Army, Navy, or Coast Guard [INS File 253]. Later, however, he testified before the Board of Special Inquiry on September 18, 1946, that as second assistant engineer in the American Merchant Marine he held a reserve commission in the United States Navy as a lieutenant. He stated his duties aboard the "Schenectady" had been to take care of the boiler room [INS File 303]. In testifying before the Court on January 14, 1947, he stated the vessel carried "6-inch and 8 anti-aircraft guns" and that the gunnery men were made up of members of the United States Navy. He further testified that the captain of the "Schenectady" belonged to the "Reserve" [R. 71].

Although appellee showed on his alien registration that he had applied for "first papers" and although there was a reference on his Geodetic Survey record that he was an "alien," "intention declared," appellee testified that he had never declared his intention or taken out a "first paper" [INS File 215].

SUMMARY OF ARGUMENT.

POINT I.

The Determination of the Board of Special Inquiry Affirmed by the Board of Immigration Appeals Is Not Open to Review by the United States District Court on a Writ of Habeas Corpus.

(a) There was substantial evidence to support the finding of alienage and inadmissibility by the administrative agency.

(b) Right to admission based upon a claim of United States citizenship does not entitle appellee to a hearing *de novo* before the District Court in Writ of Habeas Corpus proceedings.

(c) It has been judicially recognized for more than forty years that the administrative agency charged with the administration of the immigration laws is empowered to make a final determination on the issue of right to enter the United States even though such right is based upon a claim of United States citizenship.

(d) It is equally well established that courts may not substitute their judgment for that of the Immigration Boards and the Attorney General on matters of fact where there has been no denial of a fair hearing.

POINT II.

Appellee Was Arriving From a Foreign Port or Place Upon His Return to the Port of San Pedro, California, on May 20, 1945, Aboard the Oil Tanker "Schenectady."

(a) The vessel put in at various foreign ports in the South Pacific on the voyage in question which commenced with its departure from San Pedro, California, on June

10, 1944, and ended upon its return to the same port on May 20, 1945. Within the contemplation of the immigration laws, appellee was arriving from a foreign port or place notwithstanding the fact that appellee was a reserve officer of the United States Maritime Service and that the vessel "Schenectady" was being operated by the Deconhil Shipping Company, as agents of the War Shipping Administration.

(b) The question of whether or not appellee was arriving from foreign must now be determined in the light of the holding of the Supreme Court in the case of *Delgadillo v. Carmichael*,³ decided subsequent to the decision of the District Court in the instant case.⁴ Appellee denies that he knew the destination of the vessel when it departed. The evidence will show that while appellee could not have known the specific foreign port to which the vessel was destined at the time of departure, because the captain of the vessel did not receive such information until the vessel had put out to sea, the circumstances of departure and the evidence are sufficient to show actual knowledge on the part of appellee that the vessel was in fact proceeding to some foreign destination.

(c) The conclusion of the District Court that if appellee was in fact an alien he was not amenable to the immigration laws for the reason that in legal contemplation he had not left the United States because he was in fact a member of the United States Military Service is not tenable under the authorities and evidence in this case.

³333 U. S., 68 S. Ct. 10, decided November 10, 1947.

⁴*Ex parte Delaney*, 72 F. Supp. 312, decided February 21, 1947.

ARGUMENT.

POINT I.

The Determination of the Board of Special Inquiry Affirmed by the Board of Immigration Appeals Is Not Open to Review by the United States District Court on a Writ of Habeas Corpus.

At the hearing on the writ the Court completely re-examined the evidence considered by the administrative agency and on the issue of alienage concludes that [R. 43]:

“This court * * * will require no greater documentary evidence of his citizenship than that which was acceptable to the United States Maritime Service when he joined that service. * * * John Delaney is not a *homo-sina patria*, but a citizen of the United States *jus soli* and is not subject to exclusion proceedings.”

The Court may not substitute its opinion for that of the Attorney General because Congress made the decision of the administrative agency charged with the administration of the immigration laws final so long as the proceeding meets the requirement of due process.

APPLICABLE STATUTES.

Congress specifically placed the power to determine admissibility in the Attorney General and made his decision final, by Section 17 of the Immigration Act of February 5, 1917 (8 U. S. C. A. 153), which provides in part:

“* * * In every case where an alien is excluded from admission into the United States, * * * The decision of a Board of Special Inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General.”

As early as 1905 the Supreme Court, speaking through Mr. Justice Holmes, construes the statutory authority placed in the administrative agency charged with the administration of the immigration laws, to include the authority to make a final determination even where admission is sought on the basis of a claim to United States citizenship:⁵

“It is established, as we have said, that the Act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—*as well when it is citizenship as when it is domicile* * * * If, for the purpose of argument, we assume that the 5th amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws. *That the decision may be entrusted to an executive officer, and that his decision is due process of law, was affirmed and explained in Nishimura Ekin v. United States*, 142 U. S. 651, 660, 35 L. Ed. 1146, 1149, 12 S. Ct. 336, and in *Fong Yue Ting v. United States*, 149 U. S. 698, 713, 37 L. Ed. 905, 913, 13 S. Ct. 1016, before the authorities to which we already have referred.” (Emphasis added.)

The Supreme Court again in 1912, speaking through Mr. Justice Hughes, affirmed the rule that the Act of Congress makes “the decision of the appropriate immigra-

⁵U. S. v. *Ju Toy*, 25 S. Ct. 644, 646, 198 U. S. 253, 49 L. Ed. 1040.

tion officer final unless reversed on appeal to the Secretary of Commerce and Labor. And if it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their discretion, their finding upon the question of citizenship must be deemed to be conclusive and is not subject to review by the court.”⁶ The foregoing principle was reaffirmed in a decision decided in 1929, and the Supreme Court, speaking through Mr. Justice Sanford, said:⁷

“* * * *The mere fact that he claimed to be a citizen did not entitle him under the constitution to a judicial hearing; and that unless it appeared that the departmental officers to whom Congress had entrusted the decision of his claim had denied him an opportunity to establish his citizenship, at a fair hearing, or acted in some unlawful or improper way and abused their discretion, their finding upon the question of citizenship was conclusive and not subject to review, and it was the duty of the court to dismiss the writ of habeas corpus without proceeding further.*” (Emphasis added.)

In considering an appeal in 1940 from the decision of the District Court denying a writ of *habeas corpus* in the case of an applicant for admission who claimed birth in the United States and who was excluded by the Immigration and Naturalization Service, this Honorable Court emphasizes the requirement of the courts

⁶*Tang Tun v. Edsell*, 32 S. Ct. 359, 361, 23 U. S. 673, 56 L. Ed. 606.

⁷*Quon Quon Poy v. Johnson*, 47 S. Ct. 346, 348, 273 U. S. 352, 358, 71 L. Ed. 680.

to observe the foregoing well-established construction of the immigration laws, in the following words:⁸

“As has again and again been pointed out, the courts may not substitute their judgment for that of the immigration boards on matters of fact. *Unless it appears that the applicant has been denied a fair hearing, the factual decisions of the immigration authorities are final if supported by any substantial evidence.* Del Castillo v. Carr, 9 Cir., 100 F. (2d) 338, 339; Wong Gim Ngoon v. Proctor, 9 Cir., 93 F. (2d) 704; Gee Nee Way v. McGrath, 9 Cir., 11 F. (2d) 326, decided April 19, 1940.” (Emphasis added.)

WAS THERE ANY SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING OF THE BOARD OF IMMIGRATION APPEALS?

Based on a long line of judicial precedent, the law is firmly established that if there was substantial evidence to support the Board's findings, the decision of the Board of Special Inquiry, approved in due course by the Board of Immigration Appeals, under the authority delegated to it by the Attorney General, is final and is subject neither to review nor reversal by the District Court on the merits in *habeas corpus* proceedings. It is equally well established that the District Court was without authority to try *de novo* the issues even though it con-

⁸*Lee Chock Hon v. Proctor*, 9 Cir., 112 F. (2d) 246, 247. See also *Ex parte Wienke*, 31 F. Supp. 733, decided in 1940.

cluded that the Immigration Board was wrong in its decision on the factual questions.⁹

“* * * want of due process is not established by showing merely that the decision is erroneous, *Chin Yow v. United States*, *supra*, 208 U. S. 13 (28 S. Ct. 201), or that incompetent evidence was received and considered. See *Tisi v. Tod*, 264 U. S. 13, 133, 44 S. Ct. 260, 68 L. Ed. 590. Upon a collateral review in *habeas corpus* proceeding, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial.”

The Court concedes [R. 42] that it: “* * * is well aware of the fact that there are contradictory and/or untrue statements in the record which give considerable weight to the contention of the Immigration and Naturalization Service that John Delaney is not an American citizen by birth, and which warrant his being excluded from this country, all of which have been considered by the court * * *.” The District Court could only examine the proceedings to determine whether they had been properly held and whether there was some substantial evidence to support the findings.

⁹*Vajtauer v. Commissioner*, 273 U. S. 103, 106, 47 S. Ct. 302, 304, 71 L. Ed. 560.

THE DISTRICT COURT MAY NOT SUBSTITUTE ITS OPINION FOR THAT OF THE IMMIGRATION BOARD ON THE QUESTION OF CREDIBILITY OF THE EVIDENCE.

The District Court in referring to the “contradictory statements and/or untrue statements, of John Delaney” states that it “believes John Delaney has satisfactorily answered the questions as to why he represented himself to be a British subject in November of 1924, when he shipped on the S. S. ‘Nehian’ in 1924; and registered as a friendly alien during World War two * * *” [R. 42, 43].

The foregoing authorities clearly establish that the Court is not authorized to substitute its judgment for that of the Immigration Board and the Attorney General on factual issues and the credibility of the evidence. This is true even though such factual issue involves a question of citizenship, providing there is any substantial evidence to support the finding of alienage by the Immigration Board and the Attorney General.

That the District Court substituted its opinion for that of the Immigration Board on the question of the credibility of the evidence is shown by the statement, “This Court * * * will require no greater documentary evidence of his citizenship than that which was acceptable to the United States Maritime Service * * *” [R. 43]. Neither the standard nor the quantum of documentary evidence required could be measured by a requirement of the United States Maritime Service. What that Service required was wholly immaterial. Furthermore, the documentary evidence submitted to the Maritime Service consisted of the affidavits of Kenneth L. Higgins who, appellee admits, had no personal knowledge of his place of

birth or nationality and the purported affidavit of William Giles, the signature to which appellee admits he forged before the notary public.

In the execution of these affidavits the appellee shows a disposition to regard the end as justifying the means. While he apparently meant no harm, such conduct could properly be considered by the Immigration Board in determining credibility. Other examples of this attitude are shown in his testimony before the Immigration Board of Special Inquiry. For example, he testified that he had never taken out a first paper for naturalization or declared his intention to become a citizen at any time. Yet the "Notice of Shipment" in the records of the United States Coast and Geodetic Survey, executed on April 28, 1925, under the item "citizenship" shows "alien, intention declared." When confronted with the information on this form, showing his birth place as Cork, Ireland on January 14, 1897, he denied that he had furnished the information shown on the form and testified that it had been copied from his discharge papers from the vessel "Ninian" on which he testified he arrived in Wilmington, North Carolina, November 17, 1924. When confronted with the information that the copies of the manifest record of the vessel "Ninian" upon the occasion of that arrival reflected that appellee was reported on November 19, 1924 as a deserting seaman and that it was unlikely that he would have received any discharge papers, appellee nevertheless maintained that he had received a certificate from the vessel. He first testified that this certificate merely showed the date of his signing on and when he was paid off. He then qualified this statement by saying that he believed it also showed his nation-

ality [INS File 201]. The import of his testimony is to the effect that whatever papers he received from the vessel "Ninian" not only showed his birth place as Cork, Ireland on January 14, 1897, but also showed him to have declared his intention. It is unlikely that he would inform the officers of the British vessel "Ninian" that he had declared his intention to become a citizen of the United States when he states that he told them that his nationality was "British" because "they wouldn't hire American citizens" [INS File 253, 254].

Again he is unable to give any satisfactory explanation of why he included the information, when registering at the post office at Long Beach on December 16, 1940 as an alien, following the item "'date of application for naturalization,' 'December 13, 1924,'" "'date of first papers' 'not received.'"

Appellee explains that he gave the information "Nationality, British" shown on the copy of manifest of the vessel "Ninian" at the time he shipped on that vessel on October 27, 1924 at Manchester, England, because he would not have been hired otherwise. The Immigration Board was not precluded from weighing the explanation given by appellee against other evidence which it may have considered more credible. There was evidence which showed appellee had consistently claimed birth in Cork, Ireland and British nationality at a time when the motive for falsely claiming citizenship was not so strong as it has been during the war years. When appellee arrived at Wilmington, North Carolina on the vessel "Ninian" on November 17, 1924, he was recorded on the ship's manifest as being of British nationality [INS File Ex. 1, 183]. The following day (November 18, 1924) the

“Notice of Shipment” form executed before the United States Coast and Geodetic Survey shows birth in “Cork, Ireland” on “January 14, 1897,” “alien, intention declared” [INS Ex. 13, 167]. Six months later (April 28, 1925) appellee is shown by his “discharge certificate,” issued by the latter service and signed by the appellee, to have been “born at Cork, Ireland” [INS file Ex. 14, 166].

The Board reasonably could have concluded that appellee had no disagreement with the facts shown on his “Discharge Certificate” otherwise he would have protested the showing of such information thereon [INS File, Ex. 14, 166, 199].

Although the appellee denied that the employment record of the Morris Dry Dock and Repair Company related to him [INS File, Ex. 22, 315, 304], the Immigration Board was entitled to draw its own conclusion as to whether or not such record related to the appellee. He had admitted working for this company at about the time shown in the employment record. In addition to the record showing appellee to have been aged 29, single, and born in Ireland, it also contained the information that he “had taken out first papers in Jacksonville, Florida, 1924.” It is significant that the “Notice of Shipment” record of the United States Coast and Geodetic Survey executed in 1924 shows “alien, intention declared” and that his discharge from such service occurred at Jacksonville, Florida [INS File, Ex. 13, 167, 201-02, and Ex. 14, 166, 199].

In view of the various admissions of the appellee to birth in Cork, Ireland, and alienage and the failure of the appellee to produce any witnesses or documentary evidence to cast doubt upon these early admissions of alienage and the fact that the appellee had registered as an alien when there was a possibility of invoking criminal punishment

for failure of an alien to register, coupled with the further fact that an exhaustive investigation both in the United States and in Ireland failed to establish the birth of the appellee in the United States or that he had acquired United States nationality clearly overcomes any presumption of United States citizenship which might arise from the mere fact of residence in the United States and the unsupported claim of appellee to birth in this country [R. 41]. Even in a deportation proceeding where the burden of proof is on the Government, the subject of such proceedings is not “* * * protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case.”¹⁰

SHOULD THE PROCEEDING HAVE BEEN UNDER THE
AUTHORITY TO DEPORT RATHER THAN TO EXCLUDE
IN THIS CASE?

Congress in setting up Boards of Special Inquiry provided in Section 17 of the Immigration Act of February 5, 1917 (39 Stat. 887, 8 U. S. C. A. 153), that:

*“Such Boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported * * *.”* (Emphasis added.)

By Section 15 of the Immigration Act of February 5, 1917 (39 Stat. 885, 8 U. S. C. A. 151), Congress further provided for the inspection of all arriving aliens and expressly stated that a temporary removal for further examination would not constitute a “landing”:

“That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the duty of

¹⁰*U. S. v. Tod*, 44 S. Ct. 54, 56, 263 U. S. 149, 154, 68 L. Ed. 221.

the proper immigration officials to go or send competent assistants to the vessels and there inspect all such aliens or *said immigration officials may order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing * * *.*" (Emphasis added.)

The Supreme Court in construing a similar act of Congress with respect to the temporary removal of aliens stated the law to be as follows:¹¹

"By section 8 'the proper inspection officers' are required to go on board any vessel bringing alien immigrants, and to inspect and examine them and may for this purpose remove and detain them on shore, without such removal being considered a landing * * *. Putting her in the mission house as a more suitable place than the steamship, pending the decision of the question of her right to land * * * left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship."

The District Court states that it "** * ** will hold that exclusion proceedings in this case were proper to determine the question involved" [R. 24]. It has proceeded, however, to consider appellee's case as falling under Section 19 (a) of the Immigration Act of February 5, 1917

¹¹*Nishimura Ekiu v. United States*, 12 S. Ct. 336, 339, 142 U. S. 651, 35 L. Ed. 1146. Some of the problems of administering the immigration laws in connection with air travel if temporary landings were not authorized is shown in the decision of the court in the case of *United States v. Karnuth*, 74 F. Supp. 657.

(39 Stat. 889, 8 U. S. C. A. 155), which statute refers to the authority of the Attorney General to make final decisions in deportation proceedings only and not in exclusion proceedings [R. 18].

The authority of the Board of Special Inquiry and the Attorney General to make final decisions in exclusion proceedings as distinguished from deportation proceedings is found in Section 17 of the Immigration Act of February 5, 1917 (39 Stat. 887, 8 U. S. C. A. 153). The District Court concludes that the excluding proceeding was followed by appellant rather than deportation proceedings “* * * for the reason, obvious to the court,” that the burden of proof is upon the alien in exclusion proceedings, whereas in deportation proceedings the burden of proof is upon the Government [R. 23].

At no time in his testimony before the Board of Special Inquiry did appellee ever disclose that he had gone ashore and remained there overnight before proceeding to the immigration office. The first time appellee made such a claim so far as the record reflects was in his testimony before the District Court on January 14, 1947 [R. 78, 79].

While there is no testimony as to what conversation was had with appellee on the date of his arrival May 20, 1945, it does appear that he was contacted by an Immigrant Inspector. Appellee testified before the Board of Special Inquiry and identified as having been signed by himself on May 20, 1945, an “Oath of a Returning Citizen.” This was the date of his arrival on the vessel “Schenectady” at the port of San Pedro, California [INS

File, Ex. 8, 176, 244]. At 10:15 a. m. on the same date the Immigrant Inspector served a notice and order on the master of the "Schenectady" to deliver appellee to the Immigration Station, Terminal Island, for "further examination" [R. 9, 10].

It is true, however, that had it been known to the Immigration and Naturalization Service that the master of the vessel had permitted the alien to remain on land overnight before proceeding to the immigration office, exclusion proceedings would have been pursued rather than deportation proceedings for the reason, as contended before the District Court, that the law permits a temporary landing or removal to a place where a Board of Special Inquiry may be convened to hear the testimony of an applicant for admission, but certainly not with any ulterior motive of giving the Government the advantage of the burden of proof.

Very often an applicant for admission who is ill on arrival, after primary inspection by an Immigrant Inspector, may be removed to a private hospital by its employees for treatment, and hearing by the Board of Special Inquiry deferred for several days. Aircraft landing at interior points in the United States from foreign, during the night time, and where an alien passenger or crew member, after primary inspection, is ordered to be delivered for hearing before an immigration board, such alien applicant is frequently permitted lodging at a hotel or to go to his own home or friends' home to spend the night before appearing for a hearing before the Board of

Special Inquiry to determine his right to admission into the United States.

With few exceptions all ports of entry are within the United States and the alien seeking to have his admissibility determined is already physically within the United States. He has, however, been inspected at the International land boundary or on the vessel before going ashore and permitted to go to an immigration office for further examination because the primary inspector is not satisfied that the alien-applicant is entitled under the law to be landed without further examination. In these circumstances "*such temporary removal shall not be considered a landing.*"¹² (Emphasis added.)

The narrow construction placed on the law by the District Court, if permitted to stand, would upset a construction of the law long followed by the Immigration and Naturalization Service and greatly impede it in the handling of arriving applicants. Courts should give consideration to the construction of statutory language placed thereon by those entrusted by law with executive and administrative functions, and particularly so in cases where the statute authorizes the promulgation of regulations by the officers charged with the duty of executing the statute.^{12a}

¹²Section 15, Act of Feb. 5, 1917 (8 U. S. C. A. 151).

^{12a}*Jacobs v. Prichard*, 32 S. Ct. 289, 223 U. S. 200, 56 L. Ed. 731; *U. S. v. Cerecedo*, 28 S. Ct. 532, 209 U. S. 337, 52 L. Ed. 821; *Moy Chee Chong v. Weedon*, 9 Cir., 28 F. (2d) 263.

POINT II.

An "Arrival" From a Foreign Port or Place Was Made by Appellee Upon His Return to the Port of San Pedro, California, on May 20, 1945, Aboard the Oil Tanker "Schenectady."

After Touching at Various Foreign Ports in the South Pacific an "Entry" Has Been Made Within the Contemplation of the Immigration Laws, Notwithstanding the Fact That Appellee Was a Reserve Officer of the U. S. Maritime Service and That the Vessel Was Being Operated by the Deconhil Shipping Company, as Agents of the War Shipping Administration, on This Voyage.

In its most recent pronouncement on this subject the Supreme Court in referring to earlier decisions of the Court on the question, states there is language in such decisions "* * *" which taken from its context suggests that every return of an alien from a foreign country to the United States constitutes 'entry' within the meaning of the act. Thus in the *Smith* case it was stated, 289 U. S. at page 425, 53 S. Ct. at page 667, 77 L. Ed 1298, that 'any coming of an alien from a foreign country into the United States whether or not such coming be the first or any subsequent coming' is such an 'entry.' But those were cases where the alien plainly expected or planned to enter a foreign port or place. Here he was catapulted into the ocean, rescued, and taken to Cuba. He had no part in selecting the foreign port as his destination. His itinerary was forced on him by wholly fortuitous circumstances."¹³ The Supreme Court, speaking through Mr. Justice Douglas in the *Delgadillo v.*

¹³*Delgadillo v. Carmichael*, 333 U. S., 68 S. Ct. 10.

Carmichael case, adopted the reasoning of Mr. Justice Hand that it should not be imputed to Congress that it had the purpose of subjecting aliens "to the sport of chance" in stating a rule by which it could be determined whether or not an alien had made an "entry."¹⁴ We cannot read into the reasoning of Mr. Justice Hand or Mr. Justice Douglas a construction requiring that it must be shown, in addition to having made a physical entry into the United States, that an alien had a present intention of making such an entry to come within the contemplation of the Immigration laws. For example, we do not understand the decision of the Supreme Court by Mr. Justice Douglas to rule out of the term "entry" the case of an alien who has been brought to this country under extradition proceedings for criminal prosecution. In such a situation the entry of the alien is not dependent upon the "sport of chance." Otherwise such a construction would tend to put an end to the extradition of criminals from a foreign country to stand trial for commission of a crime here. Such a result would undoubtedly make the United States a desirable place for the operation of foreign criminals because they would need only run the risk of failing to outdistance the officers to a foreign border to be free of criminal prosecution. This would be the result unless there is a basis for the legal theory suggested by the Second Circuit Court of Appeals that "there would seem to be statutory authority for the eventual removal of an alien whose entrance originally involuntary becomes clearly voluntary by his continued enforced stay. Compare 8 U. S. C. A. Secs. 154, 155; U. S. *ex rel.* Ling Yee Suey v. Spar, 2 Cir., 149 F 2d 881, 883."¹⁵

¹⁴*Di Pasquale v. Karnuth*, 2 Cir., 158 F. (2d) 878.

¹⁵*U. S. v. Watkin*, 164 F. (2d) 457.

It was not until after all of the testimony before the Immigration Board had been accepted and in fact after the decision of the District Court in the instant case that the principle announced by Mr. Justice Douglas¹⁶ arose in determining what constituted an entry within the meaning of the Immigration laws. Appellee was not therefore questioned before the Immigration Board as to whether or not he intended to go foreign. He did, however, testify before the District Court in the writ proceedings on January 14, 1947, that after his shipment on the vessel "Edwin B. De Golia" he "was assigned then to go overseas" and that "the first trip on the SS 'Schenectady' was foreign ports in the South Pacific and Atlantic" and that he went straight to Australia [R. 68, 69] and that the "captain told us when we got out so many degrees where we had to go" [R. 72]. The departure manifest of the vessel "Schenectady" on the occasion of the departure in question described its voyage as foreign [R. 100].

No consideration is here being given to the theory advanced by the District Court that being a member of the United States military service appellee was never out of the United States in legal contemplation [R. 44, 45, 50, finding of fact 13]. It is not entirely clear whether the District Court advances the above theory on the basis of appellee's being in the United States military service or because he was a seaman engaged in the war effort and that his domicile could at all times be considered in the United States. There is no competent evidence showing appellee was in fact a member of the United States Navy or United States Naval Reserve. The appellee concludes in effect that the United States Maritime Service

¹⁶*Delgadillo v. Carmichael*, note 3, *supra*.

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¹⁶*Delgadillo v. Carmichael*, note 3, *supra*.

was a branch of the United States Navy and that, therefore, he was in fact a reserve officer in the United States Navy. This legal conclusion on his part is totally uncorroborated by the documentary evidence presented by him. Whether or not an alien is arriving from a foreign port or place must be determined in the light of the Immigration laws and cannot be determined by other laws relating to what constitutes domicile.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

RONALD WALKER,
CLYDE C. DOWNING,
*Assistant United States
Attorneys,*

Attorneys for Appellant.

BRUCE G. BARBER,
*District Adjudications Officer,
Immigration and Naturali-
zation Service, on the Brief.*

APPENDIX.

PARTIAL INDEX TO THE IMMIGRATION AND NATURALIZATION SERVICE FILE #5509810 T 1 [R. 55, 98, 99].

Subject Matter	Date	Pages—Read Down (Red Figures)
<i>Summaries by Chairman of the Board of Special Inquiry:</i>		
	May 23, 1945	240-238
	June 9, 1945	229-227
	August 27, 1945	199-195
	November 6, 1945	187-84
	September 18, 1946	298-295
 <i>Decisions—Commissioner, Immigration and Naturalization Service, Philadelphia:</i>		
	January 4, 1946	265-268
	October 4, 1946	339-342-D
	November 5, 1946	370-371-D
 <i>Decisions—Board of Immigration Appeals, Washington, D. C.:</i>		
	January 15, 1946	269-270
	October 9, 1946	343
	November 27, 1946	377

NUMERICAL INDEX SHOWING THE CONSECUTIVE
TYPEWRITTEN NUMBERS OF THE RECORD OF
TRANSCRIPT OF THE PROCEEDINGS BEFORE THE
BOARD OF SPECIAL INQUIRY AS THEY APPEAR
IN THE IMMIGRATION AND NATURALIZATION
SERVICE FILE AS INDICATED THEREIN BY THE
RED PENCILED PAGE NUMBERS [R. 55, 98, 99].

Typewritten Page Nos.	Red Figured Page Nos.	Typewritten Page Nos	Red Rigned Page Nos.
1	255	31	225
2	254	32	224
3	253	33	223
4	252	34	222
5	251	35	221
6	250	36	220
7	249	37	219
8	248	38	218
9	247	39	217
10	246	40	216
11	245	41	215
12	244	42	214
13	243	43	213
14	242	44	212
15	241	45	211
16	240	46	210
17	239	47	209
18	238	48	208
19	237	49	207
20	236	50	206
21	235	51	205
22	234	52	204
23	233	53	203
24	232	54	202
25	231	55	201
26	230	56	199
27	229	57	198
28	228	58	197
29	227	59	196
30	226	60	195

Typewritten Page Nos.	Red Figured Page Nos.	Typewritten Page Nos.	Red Figured Page Nos.
61	194	73	306
62	193	74	305
63	192	75	304
64	191	76	303
65	190	77	302
66	189	78	301
67	188	79	300
68	187	80	299
69	186	81	298
70	185	82	297
71	184	83	296
72	307	84	295

TABLE OF NUMBERED EXHIBITS INTRODUCED INTO EVIDENCE BEFORE THE BOARD OF SPECIAL INQUIRY SHOWING THE RED PENCILED FIGURE PAGE NUMBERS WHERE THE EXHIBIT APPEARS IN THE IMMIGRATION AND NATURALIZATION SERVICE FILE AND WHERE THE EXHIBIT WAS ACCEPTED INTO EVIDENCE AND REFERRED TO IN THE TESTIMONY.

Ex. Nos.	Title	Page Nos. (Red Figures)
1	"Ninian", manifest of arrival 11/17/24	183, 252, 253, 225, 222, 221, 219, 201
2	Alien registration record	182, 251, 252, 303-300, 299, 248, 235, 234, 230, 218, 214
3	Affidavits; John Delaney, William Giles—delayed birth certificate application	181, 245, 241, 232, 212, 211
4	Affidavits; Kenneth L. Higgins—John Delaney, delayed birth certificate application	180, 245, 241, 232, 212, 211
5	Marine navigation license of John Delaney	179, 245
6	U. S. Coast Guard identification card, application of John Delaney	178, 245
7	U. S. Coast Guard application raise, John Delaney	177, 244, 245
8	"Oath of Returning Citizen" executed by John Delaney	176, 244
9	Kenneth L. Higgins' statement concerning acquaintance with John Delaney	175-171, 244, 250, 249, 241

Ex. Nos.	Title	Page Nos. (Red Figures)
10	Vessel "John Ludgate" —no record arrival John Delaney 1913 to 1915	170, 230
11	Social Security record— request for change by John Delaney	169, 204
12	Social Security letter re request for change in record	168, 204, 189
13	"Notice of Shipment" of John Delaney with U. S. Coast and Geo- detic Survey	167, 201, 202, 233
14	"Discharge Certificate" —John Delaney from U. S. Coast and Geodetic Survey	166, 198-99, 233, 201
15	Cablegram from Regis- ter of Birth, Ireland	165, 193
16	Cablegram request to Ireland for birth record of John Delaney	164, 193
17	Marriage record "M. Delaney" and "Bridget Whalen"	163, 193
18	Draft registration card —John Patrick Delaney —World War I	162, 192-187, 247, 230
19	Specimen of handwrit- ing of John Delaney	161, 189
20	American Consular re- port re birth record of John Delaney in Ireland	321, 306
21	American Consular re- port of investigations at schools in Ireland	320-316, 305, 248, 234

Ex. Nos.	Title	Page Nos. (Red Figures)
22	War Department report re destruction of certain records	315, 304
23	Investigation of claimed employment of John De- laney at various ship- yards in New York and New Jersey	314-308, 304-300, 249, 233

No. 11749
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER,
WILLIAM LANCASTER, ELLA JACKMAN,
JOHN I. JACKMAN, GEORGE T. RENAKER,
JOHN S. PATTEN, HARRIS H. HAMMON, A.
L. BERGERE, J. C. BERGERE, WILLARD
WALLACE, EDNA M. WALLACE, JAMES P.
DELANEY, MARY J. DELANEY and IRVIN
S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administrator of the Estate
of Stanley B. Houck, Deceased, RUBY E. EDLING,
WILNA M. SHEPARD, HATTIE M. HOUCK,
RUTH M. HEBBERD, MINNIE N. McKEN-
ZIE, HOWARD H. McKENZIE, VERONICA K.
GHOSTLEY and H. W. LEWIS,

Appellees.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME I

(Pages 1 to 208, Inclusive)

Upon Appeals From the District Court of the United States
for the Southern District of California
Central Division

APR 12 1948

PAUL P. O'BRIEN

No. 11749

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GHOSTLEY and H. W. LEWIS,

Appellees.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME I

(Pages 1 to 208, Inclusive)

Upon Appeals From the District Court of the United States
for the Southern District of California
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Answer and Counterclaim of Defendants Harris H. Hammond, et al.....	19
Answer of Defendants Ella Jackman, et al.....	14
Answer of Defendants J. A. Jose, et al.....	10
Answer of J. A. Jose, et al., to Cross-Claim of Harris H. Hammond, et al.....	30
Appeal:	
Notice of, of Harris H. Hammond, et al.....	55
Notice of, of J. A. Jose, et al.....	54
Order for Transmittal of Exhibits.....	56
Statement of Points Relied on by Appellants on, (Circuit Court)	427
Certificate of Clerk.....	56
Complaint to Quiet Title, for Injunction and Damages	2
Cross-Claim of Harris H. Hammond, et al.....	26
Decree Quieting Title.....	50
Findings of Fact and Conclusions of Law.....	43
Names and Addresses of Attorneys.....	1
Notice of Appeal of Harris H. Hammond, et al.....	55
Notice of Appeal of J. A. Jose, et al.....	30
Opinion	34
Order for Judgment and Findings.....	33
Order for Transmittal of Exhibits.....	56

	Page
Reporter's Transcript of Proceedings.....	58
Plaintiffs' Exhibits (See Index to Exhibits)	
Defendants' Exhibits (See Index to Exhibits)	
Testimony on Behalf of Plaintiffs:	
Eddy, Marion H.—	
Direct examination	176
Fabbri, Eugene J.—	
Direct examination	180
Fulmer, V. G.—	
Direct examination	227
Cross-examination	234
Hodgson, Wayne—	
Direct examination	182
Cross-examination	211
Hough, Howard—	
Direct examination	159
Imler, Eugene H.—	
Direct examination	65
Lewis, Harold W.—	
Direct examination	75
Cross-examination	156
Direct examination (recalled).....	246
Cross-examination	248
Witmer, Paul B.—	
Direct examination	235
Cross-examination	242
Testimony on Behalf of Defendants:	
Bergere, J. C.—	
Direct examination	255
Cross-examination	259
Bratton, Charles H.—	
Direct examination	390

Reporter's Transcript of Proceedings	Page
Testimony on Behalf of Defendants:	
Golden, Joseph F.—	
Direct examination	371
Cross-examination	387
Hammond, Harris—	
Direct examination	356
Hodgson, Wayne—	
Direct examination	364
Cross-examination	370
Lancaster, William F.—	
Direct examination	307
Cross-examination	321
Direct examination (recalled).....	398
Cross-examination	400
Norris, Byron—	
Direct examination	262
Cross-examination	278
Thompson, Herbert C.—	
Direct examination	293
Cross-examination	299
Wallace, Willard W.—	
Direct examination	250
Direct examination (recalled).....	348
Wilson, William E.—	
Direct examination	324
Cross-examination	344
Statement of Points Relied on by Appellants on Appeal (Circuit Court)	427
Stipulation and Order re Parties Plaintiff, Dated May 15, 1946	17
Stipulation and Order Substituting Parties Plaintiff, Dated April 9, 1947.....	32

INDEX TO EXHIBITS

Plaintiffs' Exhibits:

No.	Page
1. Map prepared by Eugene H. Imler (For Identification)	66
(In Evidence)	75
2. Document entitled "Acceptance of Stipulations, Reservations and Power of Attorney" (In Evidence)	76
(In Transcript)	76
3. Same as Exhibit 2, except as noted by clerk on page 184 (For Identification).....	82
(In Evidence)	184
4. Same as Exhibit 2, except as noted by clerk on page 155 (For Identification).....	82
(In Evidence)	155
5. Same as Exhibit 2, except as noted by clerk on page 160 (For Identification).....	83
(In Evidence)	160
6. Notice of location (placer claim) (In Evidence)	87
(In Transcript)	87
7. Same as Exhibit 6, except as noted by clerk on page 164 (In Evidence).....	91
8. Same as Exhibit 6, except as noted by clerk on page 164 (In Evidence).....	92
9. Same as Exhibit 6, except as noted by clerk on page 164 (In Evidence).....	93
10. Same as Exhibit 6, except as noted by clerk on page 164 (In Evidence).....	93

Plaintiff's Exhibits:

No.	Page
11. Same as Exhibit 6, except as noted by clerk on page 164 (In Evidence).....	94
12. Same as Exhibit 6, except as noted by clerk on page 164 (In Evidence).....	95
13. Same as Exhibit 6, except as noted by clerk on page 164 (In Evidence).....	95
14. Same as Exhibit 6, except as noted by clerk on page 164 (In Evidence).....	96
15. Same as Exhibit 6, except as noted by clerk on page 164 (For Identification).....	97
(In Evidence)	161
16. Same as Exhibit 6, except as noted by clerk on page 164 (For Identification).....	97
(In Evidence)	161
17. Same as Exhibit 6, except as noted by clerk on page 164 (For Identification).....	98
(In Evidence)	162
18. Same as Exhibit 6, except as noted by clerk on page 164 (For Identification).....	98
(In Evidence)	162
19. Same as Exhibit 6, except as noted by clerk on page 164 (For Identification).....	99
(In Evidence)	163
20. Same as Exhibit 6, except as noted by clerk on page 164 (For Identification).....	100
(In Evidence)	163
21. Same as Exhibit 6, except as noted by clerk on page 164 (For Identification).....	100
(In Evidence)	164

Plaintiff's Exhibits:

No.	Page
22. Same as Exhibit 23, except as noted by clerk on page 189 (For Identification).....	101
(In Evidence)	189
23. Notice of location (placer claim) (In Evi- dence)	102
(In Transcript)	102
24. Same as Exhibit 23, except as noted by clerk on page 190 (For Identification).....	106
(In Evidence)	190
25. Same as Exhibit 23, except as noted by clerk on page 106 (In Evidence).....	106
26. Same as Exhibit 23, except as noted by clerk on page 191 (For Identification).....	107
(In Evidence)	191
27. Same as Exhibit 23, except as noted by clerk on page 192 (For Identification).....	108
(In Evidence)	192
28. Same as Exhibit 23, except as noted by clerk on page 130 (For Identification).....	108
(In Evidence)	130
29. Same as Exhibit 23, except as noted by clerk on page 109 (In Evidence).....	109
30. Same as Exhibit 23, except as noted by clerk on page 110 (In Evidence).....	110
31. Same as Exhibit 23, except as noted by clerk on page 111 (In Evidence).....	111
32. Same as Exhibit 23, except as noted by clerk on page 193 (For Identification).....	112
(In Evidence)	193

Plaintiff's Exhibits:

No.	Page
33. Same as Exhibit 23, except as noted by clerk on page 194 (For Identification).....	113
(In Evidence)	194
34. Same as Exhibit 23, except as noted by clerk on page 195 (For Identification).....	113
(In Evidence)	195
35. Same as Exhibit 23, except as noted by clerk on page 196 (For Identification).....	114
(In Evidence)	196
36. Same as Exhibit 23, except as noted by clerk on page 197 (For Identification).....	114
(In Evidence)	197
37. Same as Exhibit 23, except as noted by clerk on page 198 (For Identification).....	115
(In Evidence)	198
38. Photograph marked "Southwest Quarter of Section 21" (In Evidence).....	144
39. Photograph marked "Southwest Quarter of Section 20" (In Evidence).....	145
40. Photograph marked "Northeast Quarter of Section 20" (In Evidence).....	146
41. Photograph marked "Northwest Quarter of Section 28" (In Evidence).....	147
42. Photograph marked "Northeast Quarter of Section 29" (In Evidence).....	147
43. Photograph marked "Postmark and bottle con- taining location notices" (In Evidence).....	148
44. Photograph marked "Southwest Quarter of Section 20" (In Evidence).....	148

Plaintiff's Exhibits:

No.	Page
45. Timebook marked "Workmen's Standard Time-book" (In Evidence).....	153
46. Two slips of paper clipped together being adding machine tape slip and a currency count slip on yellow paper (In Evidence).....	178
47. Certified copy of Order of the Secretary of the Interior dated July 6, 1945 (In Evidence).....	239
48. Typewritten copy of Executive Order No. 8865, dated August 21, 1941 (In Evidence).....	240
49. Certified copy of Public Lands Order No. 287 (In Evidence)	240
50. Two photographs (For Identification).....	284
51. Photographs of the south quarter corner of Section 20 (For Identification).....	286

Defendants' Exhibits:

A. Location certificate (placer claim) (For Identification)	252
(In Evidence)	349
(In Transcript)	350
B. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
C. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
D. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349

Defendants' Exhibits:	Page
E. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
F. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
G. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
H. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
I. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
J. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
K. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
L. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
M. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
N. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349

Defendants' Exhibits:	Page
O. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
P. Same as Exhibit A, except as noted by clerk on page 351 (For Identification).....	252
(In Evidence)	349
Q. Weatherbeaten piece of cardboard, being a copy of a Location Certificate (For Identifi- cation)	252
R. Diagram (For Identification).....	264
S. Photograph (In Evidence).....	308
T. Photograph (In Evidence).....	308
U. Notice of location (placer claim) (In Evi- dence)	310
(In Transcript)	310
V. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	314
W. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	316
X. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	317
Y. Same as Exhibit U, except as noted by clerk on page 318 (mentioned).....	318
Z. Same as Exhibit U, except as noted by clerk on page 318 (mentioned).....	318
AA. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	318
BB. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	318

Defendants' Exhibits:	Page
CC. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	318
DD. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	318
EE. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	318
FF. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	318
GG. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	318
HH. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	318
II. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	318
JJ. Same as Exhibit U, except as noted by clerk on page 318 (In Evidence).....	318
KK. Amended notice of location of placer claim (In Evidence)	353
(In Transcript)	353
LL. Sketches being reproductions of the field survey made by Joseph F. Golden (For Iden- tification)	373
(In Evidence)	387
MM. Map showing the northeast quarter of the northwest quarter of Section 20 (In Evi- dence)	386
NN. Photograph of the southeast quarter of Section 28 (In Evidence).....	399

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants Jose et al.:

MICHAEL F. SHANNON

THOMAS A. WOOD

1017 Citizens National Bank Building

Los Angeles 13, Calif.

For Appellants Hammond et al.:

REYNOLDS & PAINTER

W. W. KAYE

1111 Citizens National Bank Building

Los Angeles 13, Calif.

For Appellees:

ORRIS R. HEDGES

MONTA W. SHIRLEY

756 South Broadway

Los Angeles 14, Calif. [1*]

In the United States District Court for the
Southern District of California
Southern Division

In Equity No. 703

STANLEY B. HOUCK, RUBY E. EDLING, WILNA
M. SHERARD, HATTIE M. HOUCK, RUTH M.
HEBBARD, MINNIE N. McKENZIE, EDWARD
H. McKENZIE, and VERONICA K. GHOSTLEY,
Plaintiffs,

vs.

J. A. JOSE, OLGA JOSE, CORDA LANCASTER,
WILLIAM LANCASTER, ELLA JACKMAN,
JOHN I. JACKMAN, GEORGE T. RENAKER,
JOHN S. PATTEN, HARRIS H. HAMMOND,
A. L. BERGERE, J. C. BERGERE, WILLARD
WALLACE, EDNA M. WALLACE, JAMES P.
DELANEY, MARY J. DELANEY, IRVIN S.
BARTHEL, R. UTTER, DOE ONE, DOE TWO,
DOE THREE, DOE FOUR, and DOE FIVE,
Defendants.

COMPLAINT

(To Quiet Title, for Injunction and Money Damages)

Now come the above named plaintiffs and complain of
the said defendants and say:

I.

That jurisdiction is founded on diversity of citizenship,
the existence of a Federal question and the amount in
controversy. [2]

II.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00, and the action arises out of and under the laws of the United States, as hereinafter more fully appears, and particularly under Chapter VI, Title 32 of the Revised Statutes of the United States.

III.

That the plaintiffs are now and at all times herein mentioned were a voluntary association and each of them is a citizen of the United States and a resident of the State of Minnesota.

IV.

That the plaintiffs are informed and believe, and therefore allege, that each of the defendants is now, and at all times herein mentioned, has been, a citizen and a resident of the State of California, with the exception of the defendants, Willard Wallace and Edna M. Wallace each of whom, so plaintiffs are informed and believe, and therefore, allege, is and for a long time hitherto has been a resident of the State of Colorado.

V.

Plaintiffs are not aware of the true names or capacities, whether individual, corporate, associate or otherwise, of defendants, Doe One, Doe Two, Doe Three, Doe Four and Doe Five, and therefore sues said defendants by such fictitious names, and leave of court will be asked to amend this complaint to show their true names and capacities when same have been ascertained.

VI.

That for a long time hitherto, to-wit, ever since on or about the 6th day of September, 1945, the plaintiffs have been and now are the owners and entitled to the possession of those certain lands and premises situated in Imperial County, California, known and described under the following placer mining [3] claims all in Township 14 South, Range 12 East, San Bernardino Base and Meridian, and consisting of the numbers of acres, respectively, set opposite each name, to-wit:

<u>Name</u>	<u>Description</u>	<u>Acreage</u>
Frigid No. 1	NW $\frac{1}{4}$ of Section 29	160
Frigid No. 2	NE $\frac{1}{4}$ of Section 29	160
Frigid No. 3	SW $\frac{1}{4}$ of Section 29	160
Frigid No. 4	SE $\frac{1}{4}$ of Section 29	160
Temperate No. 1	NW $\frac{1}{4}$ of Section 21	160
Temperate No. 2	NE $\frac{1}{4}$ of Section 21	160
Temperate No. 3	SW $\frac{1}{4}$ of Section 21	160
Temperate No. 4	SE $\frac{1}{4}$ of Section 21	160
Tropical No. 1	NW $\frac{1}{4}$ of Section 28	160
Tropical No. 2	NE $\frac{1}{4}$ of Section 28	160
Tropical No. 3	SW $\frac{1}{4}$ of Section 28	160
Tropical No. 4	SE $\frac{1}{4}$ of Section 28	160
Torrid No. 1	NW $\frac{1}{4}$ of Section 20	160
Torrid No. 2	NE $\frac{1}{4}$ of Section 20	160
Torrid No. 3	SW $\frac{1}{4}$ of Section 20	160
Torrid No. 4	SE $\frac{1}{4}$ of Section 20	160

that said mines and mining claims have at all times contained and still contain very valuable montmorillonite

clay in large quantities, hereinafter referred to as said clay; that the exact monetary value of said clay on the said claims is to the plaintiffs unknown, but its value is certainly of not less than many hundreds of thousands of dollars.

VII.

That ever since on or about September 6, 1945, and for a long time prior thereto, the plaintiffs have conducted wide experiments and have employed chemists and other scientists all at an expense of many thousands of dollars to the plaintiffs, to determine the worth and value of the said clay in the [4] development and growth of animal and vegetable life and in the elimination or prevention of pests of all kinds; that during the whole of the said period the said plaintiffs have at a further cost and expense of many thousands of dollars developed an extensive market for the use of the said clay for the purposes aforesaid, and as a result of such experimentation and of the efforts so put forth by the plaintiffs, the plaintiffs have established an extensive market and a wide clientele through which and to whom said clay has been sold or otherwise distributed, and the plaintiffs have made valuable contracts with other persons to distribute and market the said clay, all at great profit to the plaintiffs; that during the past several months, but more particularly during the last few weeks and continuing up to the present date, plaintiffs have received numerous orders and requests for said clay in large quantities to be used for fertilizing large growing areas of plant life and to foster the growth and improve the quality of plant and animal life; that the present is the growing season for such plant and animal life and unless plaintiffs are able to supply the said clay

immediately and without any delay to the persons who ordered and are ordering the same from the plaintiffs the value of the said clay for the present growing season will be largely or entirely lost for many months and until another growing season arrives and the value which plaintiffs have developed in its present clientele will be lost or very materially reduced.

VIII.

That notwithstanding the ownership and right of possession so held by the said plaintiffs to the land and premises above described, all of which was and is well known to the defendants, the defendants have entered into and upon the said premises and have taken possession hereof and have employed agents and servants to extract said clay from the said land and premises [5] and said clay has been so extracted and either sold and marketed or otherwise used by the defendants in violation of the rights of the plaintiffs; that the said defendants personally and through their agents and servants have threatened the plaintiffs and their employees with bodily injury if the plaintiffs or their agents or servants enter upon the said premises, or attempt to extract any of said clay from the said premises; that such actions by the defendants have so terrified and frightened the servants, agents and employees of the plaintiffs that they have refused and still refuse to go upon the premises described in paragraph VI above, or to remove any clay therefrom or to engage in any development work thereon; that the said defendants in person and by their agents and servants

have both orally and in writing, advised the customers and clients and the prospective customers and clients of plaintiffs that the plaintiffs had and have no right or title and no right of possession of the said land and premises, and had and have no right to any of the said clay extracted therefrom, and the said defendants have further advised the customers and clients and prospective customers and clients of the plaintiffs not to pay plaintiffs for said clay and have declared that if such customers and clients accepted any of said clay from the plaintiffs that they, the said defendants, would hold such customers and clients of the plaintiffs liable in damages.

IX.

That the plaintiffs have requested said defendants to cease and desist from such threats and to cease and desist from such representations to the customers and clients and to the prospective customers and clients of plaintiffs, and the plaintiffs have requested the defendants to vacate the said land and premises and to permit the plaintiffs to again take possession thereof, but the defendants have failed and refused to abide by such requests so made by the plaintiffs, and the said defendants are still continuing with such threats and still continue to occupy the said [6] land and premises to the exclusion of the plaintiffs, and still continue to threaten to hold liable in damages the customers and clients of the plaintiffs, if such customers and clients accept any of the said clay from the plaintiffs and the defendants still continue to threaten the plaintiffs and their agents, servants and employees with bodily in-

jury, as aforesaid, if they enter upon said premises, and the defendants threaten to continue with such practices and will so continue with such practices unless they are restrained from so doing by decree of this Honorable Court.

X.

That plaintiffs are informed and believe and, therefore, allege that the reasonable market value of the said clay so removed by the defendants in violation of the rights of the plaintiffs as aforesaid, is more than \$3,000.00, but the exact value of said clay so removed is to the plaintiffs unknown and it will require an accounting to determine such value.

XI.

That it is impossible to determine the monetary extent of the damage which has already been done to the plaintiffs by the defendants; that immediate and irreparable injury, loss and damage will result to the plaintiffs before notice can be served and a hearing had on an application for a restraining order unless the defendants are restrained forthwith, all for the reasons specifically set out in paragraphs VII and VIII above.

XII.

That for the reasons aforesaid money damages will not compensate the plaintiffs for the injuries that they have sustained and that they will hereafter sustain at the hands of the defendants, and that the plaintiffs have no plain, or speedy or adequate remedy at law. [7]

Wherefore, plaintiffs pray that they may have judgment against the defendants as follows:

1. That the said lands and premises above described shall be adjudged to be the property of the plaintiffs, free and clear of any and all claims made or to be made thereto by the defendants or by anyone holding under them.

2. That an accounting may be taken of the value of all of said clay so removed from the said land and premises by the said defendants or by any of them, and that the plaintiffs have judgment therefor.

3. That the defendants and each of them, their servants, agents and employees be temporarily enjoined until final hearing herein and perpetually thereafter from interfering with the possession of said land and premises by the plaintiffs; from making any threats of bodily or other injuries as against the plaintiffs, their agents, servants or employees; and from withholding from the plaintiffs the possession of the said lands and premises.

4. For costs and for such other and further [8] relief as to the court seems meet and proper.

CANNON & CALLISTER

By David H. Cannon

Attorneys for Plaintiffs

[Verified.]

[Endorsed]: Filed Feb. 25, 1946. Edmund L. Smith,
Clerk. [9]

[Title of District Court and Cause]

ANSWER OF DEFENDANTS J. A. JOSE, OLGA
JOSE, CORDA LANCASTER, WILLIAM LAN-
CASTER AND GEORGE T. RENAKER

Come now the defendants J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster and George T. Renaker, and answering plaintiffs' complaint herein admit, deny and allege as follows:

I.

Answering paragraph I of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

II.

Answering paragraph II of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

III.

Answering paragraph VI of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained, except that said defendants admit that there is contained [10] in the land in Sections 20, 21, 28 and 29, Township 14 South, Range 12 East, San Bernardino Base and Meridian, deposits of montmorillonite clay in substantial quantities.

IV.

Answering paragraph VII of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

V.

Answering paragraph VIII of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

VI.

Answering paragraph IX of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

VII.

Answering paragraph X of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

VIII.

Answering paragraph XI of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

IX.

Answering paragraph XII of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

For a Further, Separate and Second Defense to Plaintiffs' Complaint, Defendants Allege:

I.

That the defendants now are and at all times herein mentioned were residents of the State of California. [11]

II.

That on or about the 17th day of January, 1946, the defendants located upon the public domain in the County of Imperial, State of California, mining claims covering Sections 20, 21, 28 and 29, Township 14, South, Range 12 East, San Bernardino Base and Meridian, and that the said land at said time was unappropriated public land, except insofar as it was covered by prior locations made by said defendants; that on the 17th day of January, 1946, said land, except as hereinabove stated, was open to location by any citizen of the United States of America, and that said defendants on the 17th day of January, 1946, located said land in the manner required by law, and have, subsequent thereto, proceeded with the discovery work in the manner required by law, and have expended the sum of \$1,000.00 in doing said work.

III.

That the defendants have been, ever since the year 1937, in possession of said land, pursuant to locations thereon made in the manner provided by law, and have, ever since 1937, when so required by the laws of the United States, performed annually the minimum amount of assessment work required to be done in order to retain title to said lands.

IV.

That due to the fact that there was a possible dispute as to whether or not the said defendants had validly located said land in 1937, and the land being open to entry other than for said 1937 locations, the defendants did, on the 17th day of January, 1946, locate said land and have in all respects complied with the laws dealing with location, discovery and work.

V.

That the said defendants are now the owners of said land through valid locations thereof, and that the plaintiffs have no right, title or interest therein or thereto. [12]

Wherefore, defendants pray that plaintiffs take nothing by reason of their complaint, that the defendants have judgment for their costs, and for all other, further and different relief as may be just, meet and proper in the premises.

MICHAEL F. SHANNON

THOMAS A. WOOD

Attorneys for Defendants J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster and George T. Renaker [13]

[Verified.]

Received copy of the within this 8 day of March, 1946.
Cannon & Callister, R.F., Attorneys for Plaintiffs.

[Endorsed]: Filed Mar. 19, 1946. Edmund L. Smith,
Clerk. [14]

[Title of District Court and Cause]

ANSWER OF DEFENDANTS ELLA JACKMAN,
JOHN I. JACKMAN AND JOHN S. PATTEN

Come now the defendants Ella Jackman, John I. Jackman and John S. Patten, and answering plaintiffs' complaint herein admit, deny and allege as follows:

I.

Answering paragraph I of plaintiff's complaint, defendants deny generally and specifically each and every allegation therein contained.

II.

Answering paragraph II of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

III.

Answering paragraph VI of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained, except that said defendants admit that there is [15] contained in the land in Sections 20, 21, 28 and 29, Township 14 South, Range 12 East, San Bernardino Base and Meridian, deposits of montmorillonite clay in substantial quantities.

IV.

Answering paragraph VII of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

V.

Answering paragraph VIII of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

VI.

Answering paragraph IX of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

VII.

Answering paragraph X of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

VIII.

Answering paragraph XI of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

IX.

Answering paragraph XII of plaintiffs' complaint, defendants deny generally and specifically each and every allegation therein contained.

For a Further, Separate and Second Defense to Plaintiffs' Complaint, Defendants Allege:

I.

That the defendants now are and at all times herein mentioned were residents of the State of California. [16]

II.

That on or about the 17th day of January, 1946, the defendants located upon the public domain in the County of Imperial, State of California, mining claims covering Sections 20, 21, 28 and 29, Township 14 South, Range 12 East, San Bernardino Base and Meridian, and that the said land at said time was unappropriated public land, except insofar as it was covered by prior locations made by said defendants; that on the 17th day of January, 1946, said land, except as hereinabove stated, was open to location by any citizen of the United States of America, and that said defendants on the 17th day of January, 1946, located said land in the manner required by law, and have, subsequent thereto, proceeded with the discovery work in the manner required by law, and have expended the sum of \$1,000.00 in doing said work.

III.

That the defendants have been, ever since the year 1937, in possession of said land, pursuant to locations thereon made in the manner provided by law, and have, ever since 1937, when so required by the laws of the United States, performed annually the minimum amount of assessment work required to be done in order to retain title to said lands.

IV.

That due to the fact that there was a possible dispute as to whether or not the said defendants had validly located said land in 1937, and the land being open to entry other than for said 1937 locations, the defendants did, on the 17th day of January, 1946, locate said land and have in all respects complied with the laws dealing with location, discovery and work.

V.

That the said defendants are now the owners of said land through valid locations thereof, and that the plaintiffs have no right, title or interest therein or thereto. [17]

Wherefore, defendants pray that plaintiffs take nothing by reason of their complaint, that the defendants have judgment for their costs, and for all other, further and different relief as may be just, meet and proper in the premises.

MICHAEL F. SHANNON

THOMAS A. WOOD

Attorneys for Defendants Ella Jackman, John I.
Jackman and John S. Patten [18]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 21, 1946. Edmund L. Smith,
Clerk. [19]

[Title of District Court and Cause]

STIPULATION

Come now H. W. Lewis, personally, and the other parties hereto by their respective attorneys as hereinafter set out and hereby stipulate and agree that this Honorable Court may make an order in the form hereto attached.

Dated: May 15, 1946.

H. W. LEWIS

CANNON & CALLISTER

By David H. Cannon

Attorneys for Plaintiffs

MICHAEL F. SHANNON

THOMAS A. WOOD

Attorneys for Defendants, J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, George T. Renaker, Ella Jackman, John I. Jackman, and John S. Patten

REYNOLDS & PAINTER

By Howard Painter

Attorneys for Defendants, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney, Irvin S. Barthel and Harris H. Hammond [20]

[Title of District Court and Cause]

ORDER

Upon reading and filing the foregoing Stipulation and good cause appearing, upon motion of David H. Cannon, one of the attorneys for the plaintiffs,

It Is Ordered, that H. W. Lewis be, and he is, hereby made a party plaintiff herein and that the complaint on file may be amended by interlineation as follows:

1. By adding the name of H. W. Lewis as [21] one of the plaintiffs.

2. By inserting in the complaint in paragraph III, line 8, page 2, following the word "plaintiffs", the words "(except the plaintiff H. W. Lewis)", who is now and at all times herein mentioned was an agent acting for and on behalf of the other plaintiffs.

Dated: May 18, 1946.

JACOB WEINBERGER

Judge

[Endorsed]: Filed May 20, 1946. Edmund L. Smith.
Clerk. [22]

[Title of District Court and Cause]

ANSWER AND COUNTERCLAIM OF DEFENDANTS HARRIS H. HAMMOND, A. L. BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY AND IRVIN S. BARTHEL

Come now the defendants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney, and Irvin S. Barthel, and answering the complaint of the plaintiffs, admit, deny, and allege as follows:

I.

Admit the allegations of paragraph I of said complaint.

II.

Admit the allegations of paragraph II of said complaint.

III.

Deny that at any of the times mentioned in said complaint or at any other time plaintiffs were or now are a voluntary association.

IV.

Answering paragraph IV of said complaint, these defendants admit that the defendants Willard Wallace and Edna M. Wallace [23] for a long time hitherto have been and now are residents of the State of Colorado; deny that each of the remaining defendants is now and/or at all times herein mentioned has been a citizen and/or a resident of the State of California, and allege that the defendants James P. Delaney, Mary J. Delaney, and

Irvin S. Barthel are now residents of the State of Colorado, and allege that the defendants Harris H. Hammond, A. L. Bergere, and J. C. Bergere are residents of the State of California.

V.

Admit the allegations of paragraph V of said complaint.

VI.

Answering paragraph VI of said complaint these defendants deny that for a long time hitherto, to wit, ever since on or about the 6th day of September, 1945, or at any other time the plaintiffs or any of them have been and/or now are the owners and/or entitled to the possession of the lands, premises, mines, and/or mining claims particularly described in said paragraph VI; allege that these defendants for a long time hitherto have been and now are the owners and entitled to the possession of all of the lands, premises, mines, and mining claims described and referred to in said paragraph VI; admit that said mines and mining claims have at all times and still contain very valuable montmorillonite clay in large quantities; admit that the monetary value of said clay on said claims is unknown; allege that these defendants are without knowledge or information sufficient to form a belief as to the value of said mines and mining claims and on that ground deny that the value thereof is not less than many hundreds of thousands of dollars, but allege that the value thereof is probably in excess of \$100,000.00.

VII.

These answering defendants are without knowledge or information sufficient to form a belief as to the truth

of the averments set forth in paragraph VII of said complaint, and on that ground deny [24] generally and specifically each and every allegation and averment contained in said paragraph VII.

VIII.

Deny generally and specifically each and every allegation and averment contained in said paragraph VIII of said complaint, save and except that these defendants admit that they have entered into and upon said lands and premises and have taken possession thereof and have employed agents and servants to extract clay from said lands and premises and that said clay has been so extracted by these defendants and a portion thereof has been sold and marketed by these defendants; allege that these defendants have so entered upon said lands and extracted and sold said clay for the reason that these defendants were at the times said acts were performed and now are the owners and entitled to possession of said lands and premises and of the clay so extracted therefrom.

IX.

Deny generally and specifically each and every allegation and averment contained in paragraph IX of said complaint, save and except that these defendants admit that they have refused to vacate said lands and premises and that they have refused to permit the plaintiffs or any of them to take possession thereof, and admit that these defendants still continue to occupy said lands and premises and allege that these defendants occupy said lands and premises as owners thereof and are entitled to such occupancy.

X.

Deny generally and specifically each and every allegation and averment contained in paragraph X of said complaint.

XI.

Deny generally and specifically each and every allegation and averment contained in paragraph XI of said complaint.

XII.

Deny generally and specifically each and every allegation [25] tion and averment contained in paragraph XII of said complaint.

And by Way of Counterclaim Against the Plaintiffs, these answering defendants allege as follows:

I.

That jurisdiction is founded on diversity of citizenship, the existence of a Federal question, and the amount in controversy.

II.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00, and the action arises out of and under the laws of the United States, as hereinafter more fully appears, and particularly under Chapter VI, Title 32 of the Revised Statutes of the United States.

III.

That the defendants Harris H. Hammond, A. L. Bergere, and J. C. Bergere are residents of the State of California, and that the defendants Willard Wallace,

Edna M. Wallace, James P. Delaney, Mary J. Delaney, and Irvin S. Barthel are residents of the State of Colorado. These defendants are informed and believe and upon such information and belief allege that the plaintiffs are residents of the State of Minnesota.

IV.

That for a long time hitherto these answering defendants have been and now are the owners and entitled to the possession of those certain lands and premises situated in the County of Imperial, State of California, known and described under the following Placer Mining Claims, all in Township 14 South, Range 12 East, San Bernardino Base and Meridian, and consisting of the number of acres respectively set opposite each name, to wit:

<u>Name</u>	<u>Description</u>	<u>Acreage</u>
Frigid No. 1	NW $\frac{1}{4}$ of Section 29	160
		[26]
Frigid No. 2	NE $\frac{1}{4}$ of Section 29	160
Frigid No. 3	SW $\frac{1}{4}$ of Section 29	160
Frigid No. 4	SE $\frac{1}{4}$ of Section 29	160
Temperate No. 1	NW $\frac{1}{4}$ of Section 21	160
Temperate No. 2	NE $\frac{1}{4}$ of Section 21	160
Temperate No. 3	SW $\frac{1}{4}$ of Section 21	160
Temperate No. 4	SE $\frac{1}{4}$ of Section 21	160
Tropical No. 1	NW $\frac{1}{4}$ of Section 28	160
Tropical No. 2	NE $\frac{1}{4}$ of Section 28	160
Tropical No. 3	SW $\frac{1}{4}$ of Section 28	160
Tropical No. 4	SE $\frac{1}{4}$ of Section 28	160
Torrid No. 1	NW $\frac{1}{4}$ of Section 20	160
Torrid No. 2	NE $\frac{1}{4}$ of Section 20	160
Torrid No. 3	SW $\frac{1}{4}$ of Section 20	160
Torrid No. 4	SE $\frac{1}{4}$ of Section 20	160

V.

That the plaintiffs and each of them claim some right, title, estate, interest, demand, or lien as owners, encumbrancers, or otherwise in, to, or upon the lands and premises above described adversely to these defendants; that said claims are without any right or foundation and are null and void and that the plaintiffs have no right, title, estate, interest, demand, lien, or claim whatsoever in, to, or upon said lands and premises or any part thereof.

Wherefore, these defendants pray that plaintiffs take nothing by reason of their complaint herein, and that the Court render judgment in favor of these defendants against the plaintiffs as follows:

1. That the plaintiffs be required to set forth the nature of their respective claims; that it be declared and adjudged that the plaintiffs have no right, title, estate, interest, claim, demand, or lien whatever in, to, or upon said lands and premises, or any [27] portion thereof, and that said claims, of whatever nature, be adjudged null and void;

2. That the plaintiffs herein be forever enjoined and debarred from asserting any right, title, estate, interest, claim, demand, or lien whatever in, to, or upon said lands and premises, or any portion thereof, adversely to the plaintiffs;

3. That the defendants be declared the sole owners in fee simple of said lands and premises, and that the title of the defendants in said lands and premises be declared

good and valid and free of each and every claim of whatever nature of plaintiffs; and

4. For defendants' costs of suit herein, and for such other and further relief as may seem to the Court just and proper in the premises.

Dated: May 31, 1946.

REYNOLDS & PAINTER

By Howard Painter

Attorneys for Answering Defendants [28]

[Verified.] [29]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 5, 1946. Edmund L. Smith, Clerk. [30]

In the United States District Court for the
Southern District of California
Southern Division

6105-Y

In Equity No. ~~703~~

STANLEY B. HOUCK, et al.,

Plaintiffs,

vs.

J. A. JOSE, et al.,

Defendants.

HARRIS H. HAMMOND, A. L. BERGERE, J. C.
BERGERE, WILLARD WALLACE, EDNA M.
WALLACE, JAMES P. DELANEY, MARY J.
DELANEY and IRVIN S. BARTHEL,

Cross-Claimants,

vs.

J. A. JOSE, OLGA JOSE, CORDA LANCASTER,
WILLIAM LANCASTER, ELLA JACKMAN,
JOHN I. JACKMAN, GEORGE T. RENAKER
and JOHN S. PATTEN,

Cross-Defendants.

CROSS-CLAIM OF HARRIS H. HAMMOND, A. L.
BERGERE, J. C. BERGERE, WILLARD WAL-
LACE, EDNA M. WALLACE, JAMES P. DE-
LANEY, MARY J. DELANEY and IRVIN S.
BARTHEL

Come now the defendants Harris H. Hammond, A. L.
Bergere, J. C. Bergere, Willard Wallace, Edna M. Wal-

lace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel, as cross-claimants herein, and pursuant to an order of the above entitled court, file this their cross-claim against the cross-defendants above named and state as follows: [31]

I.

That jurisdiction is founded on diversity of citizenship, the existence of a Federal question, and the amount in controversy.

II.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00, and the action arises out of and under the laws of the United States, as hereinafter more fully appears, and particularly under Chapter VI, Title 32 of the Revised Statutes of the United States.

III.

That the cross-claimants Harris H. Hammond, A. L. Bergere, and J. C. Bergere are residents of the State of California, and that the cross-claimants Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney, and Irvin S. Barthel are residents of the State of Colorado. These cross-claimants are informed and believe and upon such information and belief allege that the cross-defendants above named are residents of the State of California.

IV.

That for a long time hitherto the cross-claimants have been and now are the owners and entitled to the possession of those certain lands and premises situated in the County of Imperial, State of California, known and described under the following Placer Mining Claims, all in

Township 14 South, Range 12 East, San Bernardino Base and Meridian, and subject only to the paramount title of the United States of America, and consisting of the number of acres respectively set opposite each name, to wit:

<u>Name</u>		<u>Description</u>	<u>Acreage</u>
Horseshoe	No. 2	NW $\frac{1}{4}$ of Section 29	160
"	" 1	NE $\frac{1}{4}$ of Section 29	160
"	" 4	SW $\frac{1}{4}$ of Section 29	160
"	" 3	SE $\frac{1}{4}$ of Section 29	160
Platte	" 2	NW $\frac{1}{4}$ of Section 21	160
[32]			
Platte	No. 1	NE $\frac{1}{4}$ of Section 21	160
"	" 4	SW $\frac{1}{4}$ of Section 21	160
"	" 3	SE $\frac{1}{4}$ of Section 21	160
Silverheels	No. 2	NW $\frac{1}{4}$ of Section 28	160
"	" 1	NE $\frac{1}{4}$ of Section 28	160
"	" 4	SW $\frac{1}{4}$ of Section 28	160
"	" 3	SE $\frac{1}{4}$ of Section 28	160
Gunnison	" 2	NW $\frac{1}{4}$ of Section 20	160
"	" 1	NE $\frac{1}{4}$ of Section 20	160
"	" 4	SW $\frac{1}{4}$ of Section 20	160
"	" 3	SE $\frac{1}{4}$ of Section 20	160

V.

That the cross-defendants above named, and each of them, claim some right, title, estate, interest, demand, or lien as owners, encumbrancers, or otherwise in, to, or upon the lands and premises above described adversely to these cross-claimants; that said claims are without any right or foundation and are null and void and that the cross-defendants have no right, title, estate, interest, demand, lien, or claim whatsoever in, to, or upon said lands and premises or any part thereof.

Wherefore, these cross-claimants pray that the court render judgment in favor of these cross-claimants against the cross-defendants as follows:

1. That the cross-defendants be required to set forth the nature of their respective claims; that it be declared and adjudged that the cross-defendants have no right, title, estate, interest, claim, demand, or lien whatever in, to, or upon said lands and premises, or any portion thereof, and that said claims, of whatever nature, be adjudged null and void;

2. That the cross-defendants herein be forever enjoined and debarred from asserting any right, title, estate, interest, claim, demand, or lien whatever in, to, or upon said lands and pre- [33] mises, or any portion thereof, adversely to the cross-defendants.

3. That the cross-claimants be declared the sole owners of said lands and premises, subject only to the paramount title of the United States of America, and that the title of the cross-claimants in said lands and premises be declared good and valid and free of each and every claim of whatever nature of cross-defendants; and

4. For cross-claimants' costs of suit herein, and for such other and further relief as may seem to the court just and proper in the premises.

Dated: December 5th, 1946.

REYNOLDS & PAINTER and
W. W. KAYE

By Howard Painter
Attorneys for Cross-Claimants [34]

[Verified.]

[Endorsed]: Filed Jan. 14, 1947. Edmund L. Smith,
Clerk. [35]

[Title of District Court and Cause]

ANSWER TO CROSS-CLAIM OF
HARRIS H. HAMMOND ET AL.

Come now the cross-defendants, J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker and John S. Patten, and answering cross-claimants' cross-claim, admit, deny and allege as follows, to wit: [36]

I.

Answering paragraph IV of cross-claimants' cross-claim, cross-defendants deny generally and specifically each and every allegation therein contained.

II.

Answering paragraph V of cross-claimants' cross-claim, the cross-defendants admit that they and each of them claim some right, title, estate and interest in and to the property described in cross-claimants' cross-claim, but deny that said claims are without any right or foundation and are null and void and that cross-defendants have no right, title, estate, interest, demand, lien or claim in and to said land and premises known and described as Sections 29, 21, 28 and 20, all in Township 14 South, Range 12 East, San Bernardino Base and Meridian; that the cross-defendants assert that they are now and for a long time past have been the owners of and entitled to the possession of said land, subject only to the paramount title of the United States of America, and that the cross-claim-

ants do not have any right, title, interest or lien therein or thereon in any manner, or at all.

Wherefore, cross-defendants pray that the court render judgment:

That the cross-claimants have no right, title or interest in or to said land, and that the cross-defendants are now the owners and holders thereof, subject only to the paramount title of the United States of America;

That the title of the cross-defendants in said land and premises be declared good, valid and free of each and every claim, of whatever nature, of cross-claimants;

For cross-defendants' costs of suit herein, and for such other, further and different relief as may seem to the court just and proper in the premises.

MICHAEL F. SHANNON

THOMAS A. WOOD

Attorneys for Cross-Defendants [37]

[Verified.] [38]

Received copy of the within answer to cross-claim this 22nd day of January, 1947. Reynolds & Painter, by H. V. Jacobson, Attorneys for Cross-Claimants.

[Endorsed]: Filed Jan. 23, 1947. Edmund L. Smith, Clerk. [39]

[Title of District Court and Cause]

STIPULATION SUBSTITUTING PARTIES
PLAINTIFF

It is hereby stipulated by and between Orris R. Hedges, attorney for the plaintiffs; and Reynolds and Painter and William W. Kaye, attorneys for the defendants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel; and Michael F. Shannon and Thomas A. Wood, attorneys for J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, George T. Renaker, Ella Jackman, John I. Jackman and John S. Patten; that Hattie M. Houck, as Administrator of the Estate of Stanley B. Houck, deceased, may be substituted as a party plaintiff in the above-entitled action in the place and stead of Stanley B. Houck.

Dated: April 9, 1947.

ORRIS R. HEDGES

Attorney for Plaintiffs

REYNOLDS AND PAINTER

WILLIAM W. KAYE

By Howard Painter [40]

MICHAEL F. SHANNON

THOMAS A. WOOD

By Thomas A. Wood

Attorneys for Defendants

ORDER

Upon reading the foregoing Stipulation and good cause appearing therefrom, it is hereby ordered that Hattie M. Houck, as Administrator of the Estate of Stanley B. Houck, deceased, be, and she is hereby, substituted as one of the parties plaintiff in the above-entitled action in the place and stead of Stanley B. Houck.

Dated April 14, 1947.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Apr. 14, 1947. Edmund L. Smith,
Clerk. [41]

[Title of District Court and Cause]

ORDER FOR JUDGMENT AND FINDINGS

The above-entitled cause heretofore tried, argued and submitted, is now decided as follows:

Upon the grounds stated in the opinion this day filed, judgment will be for the plaintiffs quieting their title to the claims in suit and that the defendants and cross-complainants take nothing by their cross-claims.

Findings will be prepared by counsel for the plaintiffs under Local Rule 7.

Dated this 14th day of June, 1947.

LEON R. YANKWICH
Judge

Counsel notified.

[Endorsed]: Filed Jun. 14, 1947. Edmund L. Smith,
Clerk. [42]

[Title of District Court and Cause]

OPINION

Appearances:

For the Plaintiffs: Orris W. Hedges, Esq., Monta W. Shirley, Esq., Los Angeles, California.

For the Defendants: William W. Kaye, Esq., Reynolds & Painter, Esqs., by Howard Painter, for Defendants Hammond et al. Michael F. Shannon, Esq., Thomas A. Wood, Esq., for Defendants Jose et al., Los Angeles, California. [43]

Yankwich, District Judge:—

By their Complaint, Stanley B. Houck and others seek to quiet title to sixteen placer mining claims containing deposits of montmorillonite, all located in Imperial County, California, and being in Township 14 South, Range 12 East, San Bernardino Base and Meridian.

At the trial I expressed doubt whether one who has no greater interest than a mining location could bring an action to quiet title. A further study of the problem has led me to the conclusion that the action is maintainable under the recognized principle that one who is in the process of acquiring a title to public lands has a property right which may be protected either by an action for ejectment or one to quiet title. (See, *Gauthier v. Morrison*, 1913, 232 U. S. 452; *Fox Film Corporation v. Doyal*, 1932, 286 U. S. 123, 129; *Martin v. Bartmus*, 1922, 189 C. 87.)

Each mining claim consists of 160 acres. Two groups of defendants, to be referred to as the Jose group, headed by J. A. Jose and the Hammond group, headed by Harris

H. Hammond, have answered denying the title of the plaintiffs. Each of the three groups claims title for itself. The plaintiffs, to be referred to as the Houck group, and the Hammond group rely on locations made on September 7, 1945, the first day on which placer claims could be located on the lands after they had been withdrawn from entry, first by the Secretary of the Interior as far back as 1920, and later by presidential decree which reserved them for use as a firing range [44] during the war. The Jose group, originally asserting some rights under claims dating back to 1937, when the lands were not open to entry, now ground their claim upon locations made on January 17, 1946.

Considering the first two groups, Houck and Hammond together, I am of the view that the Houck claimants have shown, by a preponderance of the evidence, full compliance with Sections 2303 and 2304 of the Public Resources Code of California and with Sections 35 and 36 of Title 30 U. S. C. A. (See, *United States v. Sherman*, 1923, 8 Cir., 288 Fed. 497; *Alaska Consolidated Oil Fields v. Rains*, 1932, 9 Cir., 54 F. (2) 868, 870-871.) The photographic evidence shows that the boundaries were clearly marked with posts which indicated the sections claimed, that notices of location of the placer claims were posted, placed in jars near the post where they could not be destroyed by the elements, that the posting of each notice was witnessed by at least two witnesses, each of whom indicated to the minute the time of the posting. This was not only a compliance with the exact wording of the statute, but was also what mining authorities consider good practice. Ricketts says that "the location notices should be posted at the discovery point and it is customary to protect it from the elements in a

box, tin can or cairn in plain view." (Manner of Locating and Holding Mineral Claims in California, 1946, by A. H. Ricketts, with revisions as of July, 1946, by C. H. Logan; and see, Ricketts, American Mining Law, 4th Ed., 1943, Secs. 616, 695.) [45]

Each notice contained a statement of the markings of the boundaries by reference to surveyed sections. A duplicate copy of each was duly recorded within the ninety day period in the County Recorder's Office of Imperial County and re-recorded after the discovery work was performed.

There is adequate evidence of work performed in compliance with the statutes, substantiated by the payroll book and by testimony of credible witnesses, including the manager of the Bank at Brawley, who witnessed the act of paying the foreman and the Mexican laborers who performed the work.

While the Hammond group claims to have located the same claims on September 7th, it is quite evident that the usual procedure of posting the claims and recording them afterwards was not followed. The form they used is a Colorado form and the fact that the instruments were all recorded at the same time,—at ten o'clock A. M., September 7, 1945, indicates that an unsuccessful attempt was made to comply with the law. Counsel for this group concede as much when they claim now that the only object in introducing the recorded claims was to show that notices of claims so worded were posted on stakes driven into the ground. A weather-beaten copy of one notice has been brought into court. An examination of it under a powerful magnifying glass shows that it could not possibly have been signed by the claimants, for no traces of ink are discernible.

It is clear that the claimants did not make any effort to "protect the notice" (See, Ricketts, American Mining [46] Law, 4th Ed., 1943, Sec. 695). The evidence as to the driving in of the stakes is equally unsatisfactory. We do not have on these notices the details which we have in the others. So that, assuming that this group performed the development work required, the Court, having to choose between two claimants who trace their claims to the same date, must, perforce, favor the group which shows more substantial compliance with the law and produces the strongest evidence of satisfying all the requirements as to locations. The fact that it was attempted later on to complete this location by recording a so-called "amended notice" of location which contained a delineation of the boundaries and a description of the work done cannot cure the insufficient proof of compliance by this group. For this amended notice was not "a true copy of the notice" as required by Section 2313 of the Resources Code, but an "amended notice" containing the additional matters just mentioned, which were not on the posted notice. (See *Brown v. Gurney*, 1906, 201 U. S. 184, 191.) While amended location notices are allowed (California Resources Code, Section 2310) they cannot, by the very wording of this section, interfere with "the existing rights of others at the time of posting and filing the amended location notices". And a recording before posting is also subject to intervening rights. (Ricketts, American Mining Law, 4th Ed., 1943, Sec. 698.)

The Jose group, which, as already stated, originally based its claim upon an attempted location in 1937, when the lands were not subject to entry, now claims rights under [47] notices of location dated January 17, 1946. After that date, they entered upon the claims and did

work of improvement. They also challenge the adequacy of the work done by the other groups on the basis of engineering measurements made long after the work was done.

I believe that satisfactory evidence of the type produced by the Houck group should not be disregarded on the basis of theoretical computations made later by interested parties,—especially when the evidence as to the work done is uncontradicted and the expenditure of money is evidenced by payroll books and by other credible testimony.

The only question which this group of claimants raised in my mind arose from their reference to *United States Borax Co. v. Ickes*, 1938, U. S. Ap. D. C., 98 F. (2) 271. They seemed to contend, as I understood them, at the trial, and as they assert in a letter written to me since the trial in answer to a comment by other counsel on the same case, that, under this decision, “there could be included no more than 20 acres for each individual locator”, and that, consequently the work had to be done on each 20 acres.

Further study of the case leads me to the conclusion that it does not apply to the situation before us. The court there was dealing with a group of persons who, after locating several placer claims, transferred them to one person who attempted to do the work. And the Court held that the limitation to persons who are not a part of an association applied. The gist of the decision is on pages 278-281 of 98 F. (2), and need not be reproduced here. [48]

Several things are quite evident from this ruling: (1) The Court holds that the requirement as to discovery on

each of the 20-acre tracts applies only to "a non-association claimant either individual or corporate". (2) As distinctly, the Court determines that an association of persons could still claim as separate locations acreage equivalent to 160 acres for each person in the association. (3) The case has no bearing on Sections like 2304 and 2305 of the California Resources Code. We particularize.

The acreage limitation merely means that a single mining location by an association cannot exceed 160 acres. But an association is not limited to one location. It may make distinct locations, not exceeding 160 acres, of contiguous lands. (*Smelting Company v. Kemp*, 1881, 104 U. S. 636; *Tucker v. Masser*, 1885, 113 U. S. 203; *Peabody Gold Mining Co. v. Gold Hills Mining Co.*, 1901, 9 Cir., 111 Fed. 817, 820; *Nome & Sinook Co. v. Snyder*, 1911, 9 Cir., 187 Fed. 385, 388.)

In *Nome & Sinook v. Snyder*, *supra*, our Circuit Court of Appeals quotes with approval the following statement from the Supreme Court of Colorado in *Kirk et al. v. Meldrum*, 1901, 28 Colo. 453, 460, 65 Pac. 633, 636:

"The construction of the act of Congress with respect to placers has universally been that the act makes provision for such locations, and prescribes the area which may be located,—in other words, the area is limited to 20 acres to each locator,—and that a number of individuals may locate a claim in common not exceeding 20 acres [49] to each person, and not exceeding 160 acres in any one claim." (Emphasis added.)

As said by the late District Judge Robert S. Bean of Oregon, while sitting in this district, in *United States v. California Midway Oil Co.*, 1919, D. C. Calif., 259 Fed. 343, 351:

“there is so far no law of Congress or regulation made in pursuance thereof limiting the number of placer mining claims an individual or association of individuals may make. On the contrary, the policy of the government seems to be to encourage the development of its mineral resources and to offer every facility for that purpose.” (Emphasis added.)

The same judge, in a prior case, also decided in our district, *United States v. Brookshire Oil Company*, 1917, D. C. Calif., 242 Fed. 718, 721, interprets the meaning of the acreage limitation in the manner stated in this opinion.

“It is true that there is no limitation as to the number of mining claims an individual or association of individuals may locate, but it is provided that no claim shall exceed 20 acres for each individual (Section 2331, R. S. (Comp. St. 1916, Sec. 4630)) or 160 acres for any association. Section 2330, R. S. (Comp. St. 1916, Sec. 4629). This is a direct and positive limitation of the amount of mining ground any one claimant may appropriate individ- [50] ually or as a member of an association in any one claim, and he cannot evade the law by the use of the names of his friends, relatives, or employees. Any device whereby one person is to acquire more than 20, or an association more than 160, acres in area, by one discovery constitutes a fraud upon the government and is without legal support and void.” (Emphasis added.)

Ricketts writes:

“The mining law prescribes a limitation of the size of a location, but there is no limit as to the number thereof that an individual, association of per-

sons, or a corporation may locate or acquire except in Alaska, Oregon and formerly in Nevada. A mining claim may include as many adjoining locations as the owner may acquire by location or otherwise, and the ground covered by all will constitute a 'mining claim' and is so designated. The terms 'location' and 'mining claim', however, are often used indiscriminately to denote the same thing." (Emphasis added.)

The conclusion is, therefore, inevitable that the plaintiffs could legally locate several claims of 160 acres each as association claims, and, having done so, they were not required to do work as to each claim on each 20 acre piece. The rule is firmly established in California and in the Ninth Circuit that work done on each 160 acre parcel of a group of claims is full compliance with the law. This for the reason "that the law does not require the annual work on each 20 [51] lot of an association claim." (Rooney v. Barnette, 1912, 9 Cir., 200 Fed. 700, 708; and see, Union Oil Co. v. Smith, 1919, 249 U. S. 337, 350 et seq.; Anvil Hydraulic & Drainage Co. v. Code, 1910, 9 Cir., 182 Fed. 205; Consolidated Mutual Oil Co. v. United States, 1917, 9 Cir., 245 Fed. 251; United States v. California Midway Oil Co., 1922, 9 Cir., 289 Fed. 516 (especially concurring opinion of Judge Ross); Reeder v. Mills, 1923, 62 C. A. 581; see also, Alaska Consolidated Oil Fields v. Rains, 1932, 9 Cir., 54 F. (2) 868, 890-891.)

This is also the general rule. (Ricketts, American Mining Law, 4th Ed., 1943, Sec. 488.)

Little need be added on the contention stressed in counsel's letter that the Jose claimants are the only ones who

have proved full compliance with the requirements of Sections 2304 and 2305 of the California Resources Code. I have already indicated why I believe that the plaintiffs have shown substantial compliance with these sections.

One observation, however, should be made. When we are dealing with an adversary proceeding between the United States and a claimant, a different rule applies than when we are passing on the right of conflicting claimants. No presumptions are indulged in favor of a claimant, even in possession, against the United States. But as between a locator in [52] possession and a subsequent intruding locator, the law favors the locator who, in good faith, occupies mineral lands and does improvement work on them against the intruder who goes on the land which he knows has been located, claimed and occupied by another and tries to oust him by doing discovery work of his own. (See, *Union Oil Co. v. Smith*, 1919, 249 U. S. 337, 346; *Rooney v. Barnette*, 1912, 9 Cir., 200 Fed. 700; *Cole v. Ralph*, 1920, 252 U. S. 286, 287; *United States Borax Co. v. Ickes*, 1938, U. S. App. D. C., 98 F. (2) 271, 274; *Ricketts*, op. cit., Sections 731, 732, 734, 1101, 1102, 1112. And see my opinion in *United States v. Mobley*, 1942, D. C. Calif., 45 Fed. Sup. 407, 408-410.)

Judgment will, therefore, be for the plaintiffs quieting their title to the claims in suit and that the defendants and cross-complainants take nothing by the cross-claims.

Dated this 14th day of June, 1947.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed Jun. 14, 1947. Edmund L. Smith, Clerk. [53]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 3rd [54] day of June, 1947, and continued on trial for successive days thereafter to and including the 5th day of June, 1947, before the Honorable Leon R. Yankwich, Judge Presiding, the Court sitting without a jury, a jury having been expressly waived, Orris R. Hedges, Esq. and Monta W. Shirley, Esq., appearing for the plaintiffs, and Reynolds & Painter, by Howard Painter, Esq., and William W. Kaye, Esq., appearing for the defendants and cross-claimants, Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel, and Michael F. Shannon, Esq. and Thomas A. Wood, Esq., by Thomas A. Wood, Esq., appearing for the defendants and cross-defendants, J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker and John S. Patten; and evidence, both oral and documentary, having been introduced and the cause submitted for decision, and the Court having heretofore rendered its written opinion, now makes its Findings of Fact, as follows:

FINDINGS OF FACT

I.

That it is true that jurisdiction of the Court is founded on diversity of citizenship, the existence of a Federal question, and the amount in controversy.

II.

That it is true that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00), and the action arises out of and under the laws of the United States, to wit, Chapter VI, Title 32, of the Revised Statutes of the United States.

III.

That it is true that the plaintiffs are now, and at all times mentioned in plaintiffs' complaint were, a voluntary association, and that it is true that each of the plaintiffs was at the time of the filing of plaintiffs' complaint, a citizen of the United States and a resident of the State of Minnesota. [55]

IV.

That it is true that each of the defendants was, at the time of filing of plaintiffs' complaint, a citizen and resident of the State of California, with the exception of the defendants Willard Wallace and Edna M. Wallace, each of whom was then a resident of the State of Colorado.

V.

That it is true that on the 7th day of September, 1945, the plaintiffs were the owners and entitled to the possession of those certain lands and premises situated in the County of Imperial, State of California, known and described under the following Placer Mining Claims, all in Township 14 South, Range 12 East, San Bernardino Base and Meridian, and consisting of the numbers of acres, respectively, set opposite each name, to wit:

<u>Name</u>	<u>Description</u>	<u>Acreage</u>
Frigid No. 1	NW $\frac{1}{4}$ of Section 29	160
Frigid No. 2	NE $\frac{1}{4}$ of Section 29	160
Frigid No. 3	SW $\frac{1}{4}$ of Section 29	160
Frigid No. 4	SE $\frac{1}{4}$ of Section 29	160
Temperate No. 1	NW $\frac{1}{4}$ of Section 21	160
Temperate No. 2	NE $\frac{1}{4}$ of Section 21	160
Temperate No. 3	SW $\frac{1}{4}$ of Section 21	160
Temperate No. 4	SE $\frac{1}{4}$ of Section 21	160
Tropical No. 1	NW $\frac{1}{4}$ of Section 28	160
Tropical No. 2	NE $\frac{1}{4}$ of Section 28	160
Tropical No. 3	SW $\frac{1}{4}$ of Section 28	160
Tropical No. 4	SE $\frac{1}{4}$ of Section 28	160
Torrid No. 1	NW $\frac{1}{4}$ of Section 20	160
Torrid No. 2	NE $\frac{1}{4}$ of Section 20	160
Torrid No. 3	SW $\frac{1}{4}$ of Section 20	160
Torrid No. 4	SE $\frac{1}{4}$ of Section 20	160

VI.

That it is true that said Mining Claims have, at all times mentioned in plaintiffs' complaint, contained, and still contain, very valuable [56] montmorillonite clay in large quantities, and that its value is well in excess of Three Thousand Dollars (\$3,000.00).

VII.

That it is true that the plaintiffs fully complied with Sections 2303 and 2304 of the Public Resources Code of California, and with Sections 35 and 36 of Title 30, U. S. C. A.

VIII.

That it is true that the plaintiffs clearly marked the boundaries of said property with posts which indicated the

Sections claimed, and that Notices of Location of Placer Claims were posted and placed in jars near the post where they could not be destroyed by the elements, all in accordance with good recognized mining practice.

IX.

That it is true that each notice so posted by plaintiffs contained a statement of the markings of the boundaries by reference to surveyed Sections, and that a duplicate copy of each notice was duly recorded, within ninety (90) days from date of posting, in the County Recorder's Office of Imperial County, California.

X.

That it is true that plaintiffs performed the necessary discovery work upon each of said Claims within the time permitted by law.

XI.

That it is true that the plaintiffs have expended many thousands of dollars to determine the worth and value of the montmorillonite clay in the development and growth of animal and vegetable life and in the elimination and prevention of pests of all kinds.

XII.

That it is true that at all times mentioned in plaintiffs' complaint plaintiffs have, at further cost and expense, developed an extensive market for the use of the said montmorillonite clay, and as a result of such experimentation and of the efforts so put forth by plaintiffs, have established an extensive market and wide clientele through which and to whom said mont- [57] morillonite clay has been sold or otherwise distributed.

XIII.

That it is true that the defendants entered into and upon the premises described in plaintiffs' complaint and attempted to take possession thereof and employed agents and servants to extract montmorillonite clay from said land and premises.

XIV.

That it is not true that the defendants extracted, sold and marketed, or otherwise used, said montmorillonite clay.

XV.

That it is not true that the defendants personally, or through their agents and servants, threatened the plaintiffs or their employees with bodily injury if plaintiffs or their agents or servants entered upon said premises or attempted to extract any of said montmorillonite clay therefrom.

XVI.

That it is not true that defendants' actions terrified and frightened plaintiffs' servants, agents and employees.

XVII.

That it is not true that the defendants, either in person or through their agents and servants, advised plaintiffs' customers and clients, and prospective clients, to the effect that plaintiffs had no right, title or interest in and to said premises and were not entitled to possession thereof or to extract montmorillonite clay therefrom.

XVIII.

That it is not true that defendants advised plaintiffs' prospective customers and clients not to pay plaintiffs for said montmorillonite clay, or that if said customers and clients accepted any of said montmorillonite clay from plaintiffs that defendants would hold such customers and clients of plaintiffs liable in damages.

XIX.

That it is not true that plaintiffs have requested defendants to cease and desist from such threats and to cease and desist from such [58] representations to the customers and clients, and to the prospective customers and clients of plaintiffs.

XX.

That it is true that plaintiffs have requested defendants to vacate said land and premises and to permit plaintiffs to again take possession thereof.

XXI.

That it is true that defendants have not removed montmorillonite clay from said premises.

XXII.

That it is true that plaintiffs have not sustained any monetary damages in the premises.

XXIII.

That it is true that plaintiffs have no plain, or speedy or adequate remedy at law.

XXIV.

That all of the denials of defendants' answers and all of the allegations and averments of said answers, and all the allegations and averments of defendants' cross-claims, adverse to and inconsistent with these Findings, are untrue.

CONCLUSIONS OF LAW

And as Conclusions of Law From the Foregoing Facts, the Court Finds:

I.

That the plaintiffs are the owners and entitled to possession of those certain Mining Claims described in plaintiffs' complaint.

II.

That the plaintiffs are entitled to a judgment quieting their title to said Mining Claims against the defendants and cross-claimants.

III.

That the defendants and cross-claimants are entitled to take nothing by reason of their said cross-claims and cross-complaint. [59]

IV.

That the plaintiffs are entitled to their costs of suit incurred herein.

Judgment is hereby ordered to be entered accordingly.

Dated: July 2, 1947.

LEON R. YANKWICH

United States District Judge

The foregoing Findings of Fact and Conclusions of Law are approved as to form: Reynolds & Painter and William W. Kaye, by, Attorneys for Defendants and Cross-Claimants. Michael F. Shannon and Thomas A. Wood, by, Attorneys for Defendants and Cross-Defendants. [60]

Received copy of the within Findings of Fact, etc., this 27 day of June, 1947. Michael F. Shannon, Thomas A. Wood, by N. Featherstone, Attorneys for Defs. Jose et al.

Received copy of the within Findings of Fact, etc., this 27 day of June, 1947. Reynolds, Painter & Cherniss, by Louis Miller, Attorneys for Defendants.

[Endorsed]: Filed Jul. 11, 1947. Edmund L. Smith, Clerk. [61]

In the United States District Court for the
Southern District of California
Central Division

In Equity No. 6105-Y

STANLEY B. HOUCK, RUBY E. EDLING, WILNA
M. SHEPARD, HATTIE M. HOUCK, RUTH M.
HEBBARD, MINNIE N. McKENZIE, HOW-
ARD H. McKENZIE, and VERONICA K.
GHOSTLEY,

Plaintiffs,

vs.

J. A. JOSE, OLGA JOSE, CORDA LANCASTER,
WILLIAM LANCASTER, ELLA JACKMAN,
JOHN I. JACKMAN, GEORGE T. RENAKER,
JOHN S. PATTEN, HARRIS H. HAMMOND,
A. L. BERGERE, J. C. BERGERE, WILLARD
WALLACE, EDNA M. WALLACE, JAMES P.
DELANEY, MARY J. DELANEY, IRVIN S.
BARTHEL, R. UTTER, et al.,

Defendants.

HARRIS H. HAMMOND, A. L. BERGERE, J. C.
BERGERE, WILLARD WALLACE, EDNA M.
WALLACE, JAMES P. DELANEY, MARY J.
DELANEY and IRVIN S. BARTHEL,

Cross-Claimants,

vs.

J. A. JOSE, OLGA JOSE, CORDA LANCASTER,
WILLIAM LANCASTER, ELLA JACKMAN,
JOHN I. JACKMAN, GEORGE T. RENAKER
and JOHN S. PATTEN,

Cross-Defendants.

DECREE QUIETING TITLE

The above entitled cause came on regularly for trial on the 3rd day of June, 1947, before the Honorable Leon R. Yankwich, Judge Presiding, [62] the Court sitting without a jury, a jury having been expressly waived, Orris R. Hedges, Esq. and Monta W. Shirley, Esq., appearing for the plaintiffs, and Reynolds & Painter, by Howard Painter, Esq., and William W. Kaye, Esq., appearing for the defendants and cross-claimants, Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel, and Michael F. Shannon, Esq., and Thomas A. Wood, Esq., by Thomas A. Wood, Esq., appearing for the defendants and cross-defendants, J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker and John S. Patten, and the action having been dismissed as to all the fictitious defendants; and evidence, both oral and documentary, having been introduced and the cause submitted for decision, and the Court having heretofore rendered its written opinion and heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised;

Wherefore, by reason of the law and the Findings of Fact, as aforesaid,

It Is Ordered, Adjudged and Decreed that the plaintiffs were during all of the times mentioned herein, and now are, the owners of those certain Placer Mining Claims located in Township 14 South, Range 12 East, San Bernardino Base and Meridian, and consisting of the numbers of acres, respectively, set opposite each name, to wit:

<u>Name</u>	<u>Description</u>	<u>Acreage</u>
Frigid No. 1	NW $\frac{1}{4}$ of Section 29	160
Frigid No. 2	NE $\frac{1}{4}$ of Section 29	160
Frigid No. 3	SW $\frac{1}{4}$ of Section 29	160
Frigid No. 4	SE $\frac{1}{4}$ of Section 29	160
Temperate No. 1	NW $\frac{1}{4}$ of Section 21	160
Temperate No. 2	NE $\frac{1}{4}$ of Section 21	160
Temperate No. 3	SW $\frac{1}{4}$ of Section 21	160
Temperate No. 4	SE $\frac{1}{4}$ of Section 21	160
Tropical No. 1	NW $\frac{1}{4}$ of Section 28	160
		[63]
Tropical No. 2	NE $\frac{1}{4}$ of Section 28	160
Tropical No. 3	SW $\frac{1}{4}$ of Section 28	160
Tropical No. 4	SE $\frac{1}{4}$ of Section 28	160
Torrid No. 1	NW $\frac{1}{4}$ of Section 20	160
Torrid No. 2	NE $\frac{1}{4}$ of Section 20	160
Torrid No. 3	SW $\frac{1}{4}$ of Section 20	160
Torrid No. 4	SE $\frac{1}{4}$ of Section 20	160

and are entitled to the possession of said Mining Claims herein described; that the claims of the defendants, J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker and John S. Patten, and the claims of the cross-claimants, Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel, and all who claim title under them, in and to said Placer Mining Claims, are without any right whatever; that said defendants and cross-claimants have no right, title, interest, claim or estate whatsoever, in or upon said Placer Mining Claims, or any part thereof, and said defendants and cross-claimants, and all persons claiming under them, are hereby enjoined and debarred from claiming or asserting any estate, right,

title, interest in, or claim or lien upon said Placer Mining Claims, or any part thereof.

It Is Further Ordered, Adjudged and Decreed that said plaintiffs have and recover of and from said defendants and cross-claimants, J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker, John S. Patten, Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel, the costs of said plaintiffs herein expended and taxed in the sum of \$227.32.

That said real property is situate in the County of Imperial, State of California, and more particularly described as follows, to wit: Section 20, Section 21, Section 28 and Section 29, in Township 14 South, Range 12 East, San Bernardino Base and Meridian. [64]

Dated: July 2, 1947.

LEON R. YANKWICH

United States District Judge

The foregoing Decree Quieting Title is hereby approved as to form: Reynolds & Painter and William W. Kaye, by, Attorneys for Defendants and Cross-Claimants. Michael F. Shannon and Thomas A. Wood, by, Attorneys for Defendants and Cross-Defendants.

Judgment entered Jul. 11, 1947. Docketed Jul. 11, 1947. C. O. Book 44, page 182. Edmund L. Smith, Clerk; by John A. Childress, Deputy.

Judgment Satisfied 9/10 47, by flg. satis. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by Edw. F. Drew, Deputy. [65]

Received copy of the within Decree Quieting Title this 27 day of June, 1947. Michael F. Shannon, by N. Featherstone, Attorneys for Defs. Jose et al.

Received copy of the within Decree this 27 day of June, 1947, Reynolds, Painter & Cherniss, by Louis Miller, Attorneys for Defendants.

[Endorsed]: Filed Jul. 11, 1947. Edmund L. Smith, Clerk. [66]

[Title of District Court and Cause]

NOTICE OF APPEAL [67]

Notice is hereby given that J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker and John S. Patten, defendants and cross-defendants above named, hereby appeal to the Circuit Court of Appeals, Ninth Circuit, from the final judgment entered in this action on July 11, 1947.

Dated this 27th day of August, 1947.

MICHAEL F. SHANNON
THOMAS A. WOOD

Attorneys for Appellants, J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker and John S. Patten, 1017 Citizens Natl. Bank Building, Los Angeles 13, California [68]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 27, 1947. Edmund L. Smith, Clerk. [69]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that Harris H. Hammond, A. L. [70] Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel, defendants and cross-claimants above named, hereby appeal to the Circuit Court of Appeals, Ninth Circuit, from the final judgment entered in this action on July 11, 1947.

Dated this 27th day of August, 1947.

REYNOLDS & PAINTER and
W. W. KAYE

By Howard Painter

Attorneys for Appellants, Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney, and Irvin S. Barthel,

1111 Citizens Natl. Bank Building, Los Angeles 13,
California [71]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 27, 1947. Edmund L. Smith,
Clerk. [72]

[Title of District Court and Cause]

ORDER FOR TRANSMITTAL OF LEGAL PAPERS
AND EXHIBITS

Notice of Appeal from the final Judgment in this action having heretofore been filed herein,

Now, Therefore, pursuant to the provisions of Rule 75(i) of the Federal Rules of Civil Procedure,

It Is Hereby Ordered, that all original papers and exhibits introduced in evidence, or marked for identification, in [79] the above-entitled cause, be sent to the Circuit Court of Appeals, Ninth Circuit, as part of the record on appeal in said cause, in lieu of copies of such papers and exhibits.

Dated: October 2, 1947.

LEON R. YANKWICH

Judge of the United States District Court

[Endorsed]: Filed Oct. 2, 1947. Edmund L. Smith,
Clerk. [80]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 80, inclusive, contain full, true and correct copies of Complaint to Quiet Title, for Injunction and Money Damages; Answer of Defendants J. A. Jose et al.; Answer of Defendants Ella Jackman et al.; Stipulation and Order

re Party Plaintiff; Answer and Counterclaim of Defendants Harris H. Hammond et al.; Cross-Claim of Harris H. Hammond et al.; Answer to Cross-Claim of Harris H. Hammond et al.; Stipulation and Order Substituting Parties Plaintiff; Order for Judgment and Findings; Opinion; Findings of Fact and Conclusions of Law; Decree Quieting Title; Notice of Appeal of J. A. Jose et al.; Notice of Appeal of Harris H. Hammond et al.; Designation of Record on Appeal of J. A. Jose et al.; Designation of Record on Appeal of Harris H. Hammond et al.; and Order for Transmittal of Papers and Exhibits which, together with copy of Reporter's Transcript of Proceedings on June 3, 4 and 5, 1947 and Original Plaintiffs' Exhibits 1 to 51, inclusive, and Original Defendants' Exhibits A to NN, inclusive, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$19.25 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 2nd day of October, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Leon R. Yankwich, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, June 3rd, 1947

Appearances:

For the Plaintiffs: O. R. Hedges, Esquire, and Monta W. Shirley, Esquire.

For the Defendants J. A. Jose, et al: Michael F. Shannon, Esquire, and Thomas A. Wood, Esquire.

For the Defendants A. L. Bergere, et al.: William W. Kaye, Esquire, and Messrs. Reynolds & Painter, by Howard Painter, Esquire.

Los Angeles, California, Tuesday, June 3, 1947

10:00 A. M.

The Court: Call the case, Mr. Clerk.

The Clerk: Case No. 6105-Y, Civil, Hattie M. Houck, Administrator of the Estate of Stanley B. Houck, deceased, versus J. A. Jose, et al.

Mr. Hedges: The plaintiff is ready.

Mr. Painter: Defendants are ready.

Mr. Wood: We are ready.

The Court: Would you like to make an opening statement?

Mr. Hedges: I would like to, your Honor, yes.

I would first, with permission of the court, like to ask to have associated with me Mr. Monta W. Shirley as one of the plaintiffs' attorneys. Mr. Shirley is authorized to practice in the Federal court.

The Court: All right.

Mr. Hedges: This action, your Honor, is an action on behalf of the plaintiffs to quiet title to certain lands located in Imperial County, California, and for a permanent injunction and money damages.

The plaintiff will attempt to prove that on September 6th, 1945, Sections 20, 21, 28 and 29 in Township 14 South, Range 12 East, San Bernardino Meridian, Imperial County, California, were open for entry by the United States Government. [7*]

That on the 6th of September, 1945, the plaintiffs, through their agents and attorney-in-fact, caused to be filed on the lands certain mining claims. These mining claims were known as Frigid No. 1 on the Northwest Quarter of Section 29, containing 160 acres.

Frigid No. 2 on the Northeast Quarter of Section 29, containing 160 acres.

Frigid No. 4 in the Southwest Quarter of Section 24, containing 160 acres.

Frigid No. 4 in the Southeast Quarter of Section 29, containing 160 acres.

Temperate No. 1, in the Northwest Quarter of Section 21, containing 160 acres.

Temperate No. 2, in the Northeast Quarter of Section 21, containing 160 acres.

Temperate No. 3, in the Southwest Quarter of Section 21, containing 160 acres.

And Temperate No. 4, in the Southeast Quarter of Section 21, containing 160 acres.

*Page number appearing at top of page of original Reporter's Transcript.

Tropical No. 1, in the Northwest Quarter of Section 28, containing 160 acres.

Tropical No. 2, in the Northeast Quarter of Section 28, containing 160 acres.

Tropical No. 3, in the Southwest Quarter of Section 28, containing 160 acres. [8]

And Tropical No. 4, in the Southwest Quarter of Section 28, containing 160 acres.

Torrid No. 1, in the Northwest Quarter of Section 20, containing 160 acres.

Torrid No. 2, in the Northeast Quarter of Section 28, containing 160 acres.

Torrid No. 3, in the Southwest Quarter of Section 20, containing 160 acres.

And Torrid No. 4, in the Southeast Quarter of Section 20, containing 160 acres.

In other words, there are sixteen claims in all.

Subsequent to the date of the filing of these claims upon the lands that I have just described the plaintiffs through their agents and attorney-in-fact, caused the necessary development work to be done upon this property in that they moved at least seven cubic yards of material from each of the claims and expended the sum of at least \$1.00 per acre on the total acreage filed upon.

We will further attempt to prove that the lands contain in very, very valuable quantity Montmorillonite Clay and that they have expended considerable sums of money in developing the property and that they have employed chemists and other scientists to analyze the material, the mineral, that was found, for the use of food supplements and other uses in connection with poultry, cattle, and

agricultural [9] products, and that notwithstanding their right to the lawful possession of the properties to which I have referred, the defendants and each of them by threats of violence, bodily injury and so forth subsequent to the date of the filing and of the performance of development work, prohibited the plaintiffs, their agents, servants and employees from entering upon this land.

That although the plaintiffs have requested the defendants to desist from these threats they have failed and refused to do so.

I might add that in the first instance an injunction pendente lite was requested before I became associated in the case at all, and ultimately a stipulation was entered into between all of the defendants and the plaintiffs to the effect that none of the parties would enter upon the land or remove any of the material therefrom pending the final determination of this action.

We intend to prove that as a result of the things that I have just mentioned that we have suffered an irreparable loss and damage and we seek from the court a decree to quiet title to the property and for an accounting of the clay which the defendants removed from the property and a perpetual injunction.

The Court: Before you proceed further, have any of the fictitious persons been served?

Mr. Hedges: No, your Honor. We move to dismiss as to [10] them.

The Court: Doe One, Doe Two, Doe Three, Doe Four, and Doe Five.

Mr. Hedges: That is correct, your Honor. We move to dismiss as to them.

The Court: Then we are proceeding against the named defendants only?

Mr. Hedges: Yes. Now, in order that the court may be more familiar with the entire action I think it is only fair to say now, even though this is a quiet title action, that it is a little out of the ordinary from the usual type of quiet title action.

It is only fair to state that it apparently is contended by the defendants—and for the purpose of brevity I think we can refer to the two groups of defendants, one as the Jose group and one as the Hammond group, if that is satisfactory with you gentlemen. There are several defendants under each one of those groups, but if we may refer to them as those groups it will save a lot of time.

I believe it is contended by the defendants, by the defendants Jose and his group, that they originally filed on this land approximately June 26th of 1937, and that the defendants of the Hammond group and others filed on the land on September 7th, that being the same date as the plaintiffs' second filing. [11]

The plaintiff filed on the 6th of September and also on the 7th. The Hammond group filed an amended location notice on the same date—that is, they filed two location notices on the 7th of September and filed another location notice on November 10th, 1945.

The Jose group filed again a notice of intention to locate on January 14th of the year 1946, followed by an actual filing on the property on January 17th, 1946, and then re-reported their notice of location on April 12th, 1946.

So, the dispute here appears to be as to who actually filed on the property first and did the necessary improvement work as between the three classes of parties to this action.

Now, I understand your Honor is anxious that we complete the case, if at all possible, by the end of the week. I assure you as far as the plaintiffs are concerned we will do our utmost to do so. I think we can shorten the case by several stipulations here to which I think the defendants will agree.

The Court: Very well.

Mr. Hedges: Correct me if I am wrong, gentlemen. I think it can be stipulated that the plaintiffs to this action are all residents of the State of Minnesota; that the group of defendants known as the Jose group are residents of the State of California. [12]

Mr. Wood: Yes.

Mr. Hedges: That a portion of the group of the Hammond defendants are residents of the State of Colorado. The remaining group are residents of the State of California.

Mr. Painter: Yes.

Mr. Hedges: Will you so stipulate?

Mr. Painter: So stipulate.

Mr. Hedges: I think it can also be stipulated, your Honor, that the value of the mineral deposits on the land just set forth is greatly in excess of the jurisdiction of the court. In other words, it is greatly in excess of the sum of \$3,000.00. Can that be stipulated?

Mr. Painter: So stipulated.

Mr. Wood: So stipulated.

Mr. Hedges: I believe it can also be stipulated that all of the parties to this action, that is the plaintiff and both groups of defendants, filed with the district Land Office of the Department of Interior and reported with the County Recorder the usual stipulations that are required in mining matters with the United States of America.

Mr. Painter: . So stipulated.

Mr. Wood: So stipulated.

Mr. Hedges: And I believe it can be further stipulated that this is Governmentally surveyed land. Is that stipulated to? [13]

Mr. Wood: Yes.

Mr. Painter: Yes, so stipulated.

Mr. Hedges: Thank you, your Honor.

The Court: All right. Does either counsel for the defendants desire to make an opening statement at this time?

Mr. Painter: If your Honor please, I would like to reserve my statement until after plaintiffs' case has been presented.

There are many phases that might not necessarily be gone into in view of the evidence which might be introduced by the plaintiff.

The Court: Very well. Call your first witness.

Mr. Hedges: Call Mr. Imler.

EUGENE H. IMLER,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Eugene H. Imler.

Direct Examination

By Mr. Hedges:

Q. Where do you reside, Mr. Imler?

A. Imperial County.

Q. Do you have a street address or postoffice address?

A. Route 2, Box 94, Imperial. [14]

Q. And what is your business, profession, or occupation?

A. Registered civil engineer.

Q. How long have you been so engaged in that business?

A. Since 1918—29 years.

Q. And in what locations?

A. In California practically the entire time—Los Angeles, Pasadena. I was assistant City Engineer of Pasadena and in soil work down in Imperial Valley the last ten years.

Mr. Painter: If your Honor please, we can barely hear the witness.

The Witness: I will speak louder.

Q. By Mr. Hedges: And will you tell us just briefly what your business consists of as a registered engineer and what you do in that position in Imperial County?

A. Making surveys, property surveys, studying soil conditions for irrigation purposes; studying the development of crops in the Imperial Valley.

Q. I will show you a map which I have previously shown to both counsel for the defendants, and ask you

(Testimony of Eugene H. Imler)

whether or not you prepared this map or whether or not it was prepared under your supervision and direction.

A. Yes. I prepared the map. I was on the field with my crew and I put my affidavit of the State of California [15] signifying it a correct survey and truly represents things I found on the ground.

Mr. Hedges: May this be marked Plaintiffs' first exhibit for identification?

The Court: Yes.

Mr. Painter: I am sorry to bring this up again, but we cannot hear the witness over here at all.

The Court: Will you speak up, please?

The Witness: All right.

The Clerk: Plaintiffs' Exhibit 1 for identification.

(The document referred to was marked as Plaintiffs' Exhibit 1, for identification.)

Mr. Hedges: I would like to put it on the board, if I may, your Honor.

The Court: Very well.

Q. By Mr. Hedges: Now, will you tell us, Mr. Imler, what dates you made this survey map?

A. The date is on the map. It is May 31st.

Q. 1947? A. Correct.

Q. And how long prior to that date did you go on the property, if you did, for the purpose of accumulating the material which you have on the map?

A. Originally I had a crew in September—I guess it was August 1945. [16]

Q. You went upon each of these four sections in August of 1945?

A. Either August or the first part of September—just prior to the filing of the claims.

(Testimony of Eugene H. Imler)

Q. And just what did your work and the work of your crew you had at that time consist of? [17]

A. Locating the Government section corners in order to place the notices on the proper quarter corners.

Q. Will you show us on this map just where the Governmental metal stakes are located?

A. The northwest quarter of section 20, the north one-quarter corner of section 20, the northeast corner of section 20 and also the northwest corner of section 21.

The north quarter corner of section 21. The northeast corner of section 21. The east quarter corner of section 21. The southeast corner of section 21. The south, which is also the northeast corner of section 28. The quarter corner between sections 21 and 28. The section corner between sections 20, 21, 29 and 28. The quarter corners between sections 21 and 20. The quarter corner between sections 20 and 29. The section corner common to sections 20 and 29. The quarter corner between sections 20 and 19. The quarter corner between sections 29 and 30. Also the southwest corner of section 29.

The quarter corner between sections 29 and 32. The common corner of sections 28, 29, 32 and 33.

The quarter corner between sections 28 and 33. The southeast corner of section 28. The east quarter corner of section 28. They are the general land office pipes.

Q. And from those pipes—from those pipe locations you arrived at your figures for the various locations, mining [18] locations which you have marked on the map, is that correct?

A. In 1945 we wanted to make sure that each pit was dug in its proper corner and the pits were dug as shown here. And this year, in May, 30 and 31, we tied those in

(Testimony of Eugene H. Imler)

to the section corners to get the true distance away from the quarter corners.

Also at the same time we took the measurements of the pit and the yardage that had been removed.

Q. In other words, if I understand you correctly, in September of 1945 when you first went upon the property for the purpose of surveying the claims, the development work had not been done? A. That is correct.

Q. And did you at that time stake out various locations for development work?

A. We located the different section corners and placed where the pit should be dug so they would fall within the proper quarter corners.

Q. And at whose request did you do this work in 1945?

A. At the request of Mr. Louis.

Q. And whose request did you do it in 1946?

A. By the same parties.

Q. All right. Now, starting with the claim known as Torrid No. 1. Will you explain to us the location that you have marked thereon and how you arrived at it? [19]

A. Having the different corners located we were able to turn an angle from the section lines to the pit corner. Also getting the angle of the pit in relationship to the other lines of the survey and measuring the dimensions of the pit as I mentioned, the outside dimensions and also the depth, in order to figure the yardage.

Q. Did you find in 1946 that that was the same location that you had staked in 1945? A. Correct.

Q. Now, will you tell us—can you tell us from the map just what the location is?

A. For Torrid No. 1 it is a distance of 131 feet in a southeasterly direction from the northwest corner of section 20.

(Testimony of Eugene H. Imler)

Q. Can you tell us how big the pit is—that is in size?

A. The outside dimensions are 25 by 25 and the depth varies—I have calculation sheets, the depth varied from two to five feet all through the property.

Q. Now, did you make an estimate of the number of yards that had been removed from this pit?

A. I calculated it—it is not estimated but calculated.

Q. Will you tell us how you calculated it?

A. By taking the dimensions of the pit, also the [20] elevations of the natural ground surface which still shows and the bottom of the pit where the digging had ceased.

Q. How much yardage did you determine by this method had been removed from the claim location known as Torrid No. 1? A. 46 cubic yards.

Q. Now, let us take Torrid No. 2. Will you tell us—I assume you arrived at that location in the same manner as you arrived at it in Torrid No. 1.

A. Practically.

Q. Will you tell us what the dimensions are or, strike that. What the location is of that claim?

A. It is located in the northeast one-quarter of section 20.

Q. And how far from the boundary lines?

A. 135 feet in a northwesterly direction from the quarter corner between 20 and 21.

Q. And did you determine the size of that pit?

A. I did.

Q. Will you tell us what that was?

A. 29 by 30 outside dimensions, containing 113 cubic yards of excavated material.

Q. Did you estimate or calculate approximately how deep this pit was? A. I did. [21]

(Testimony of Eugene H. Imler)

Q. How deep was it?

A. I would have to go to my notes.

Q. Do you have your field notes with you?

A. I do.

Q. Is that to which you are now referring?

A. That is correct. It is field notes for Torrid No. 2. Here it is. The depth averaged—it varies but it averaged three and eight tenths feet. That was irregular digging. Practically the same depth all around in the pit. Some of it varied a little bit and we had to calculate the yardage by a little more difficult method.

Q. I believe you said you calculated the yardage at 113 cubic yards? A. Correct.

Q. All right. Now, on to Torrid No. 3. Will you give us the location of that pit?

A. That is located in the southwest one-quarter of section 20, 72 feet in a northeasterly direction from the southwest corner of section 20.

Q. And what is the size of that pit?

A. That pit is 20 by 33 feet.

Q. And did you calculate or get an average depth of that pit?

A. I did. These are not in the order you are asking me because we went around—here it is. Torrid No. 3. [22] The average depth in that pit is 2 and 7/10 feet.

Q. And did you calculate the number of yards of material removed from that pit?

A. I did and found it to be 80.6. All these yardage figures are on this map that is submitted in evidence.

(Testimony of Eugene H. Imler)

Q. Now on Torrid No. 4 will you tell us the location of the pit on that claim?

A. It is in the southeast one-quarter of section 20. The pit is located 69 feet in a northwesterly direction from the southeast corner of section 20.

Q. And what is the size of the pit?

A. The size is 21 by 18.

Q. And did you calculate the yardage?

A. 32.5 cubic yards.

Q. Now, Temperate No. 1. Will you give us the location of the pit on that claim?

A. It is in the northwest one-quarter of section 21. The pit is located 45 feet in a northeasterly direction from the west one-quarter corner of section 21.

Q. And what is the size of that pit?

A. The size of that pit is—

Mr. Wood: We might expedite this by having him read it off of the map. He put it on there.

Mr. Painter: No objection as far as we are concerned.

Q. By Mr. Hedges: All right. He inadvertently [23] neglected to put that one on the map. He has to refer to his field notes.

Q. By Mr. Hedges: Just mark it right on the map if you will.

The Witness: 27 feet by 27 feet outside dimensions.

Q. And do you have the average depth of that pit?

A. The average of that pit is 2.4 feet.

Q. 2.4 feet. A. Correct.

Q. And did you calculate the number of yards of material removed from that location?

A. 70.9 cubic yards.

(Testimony of Eugene H. Imler)

Q. Now, moving to Temperate No. 2. Will you give us the location of that. You can read it from the figures right off of there, if you will.

A. That is in the northeast one-quarter of section 21, located 101 feet in a northwesterly direction from the quarter corner between 21 and 22.

Q. And the size of it?

A. The size of the pit is 25 by 24 and contained just an even 100 cubic yards.

Q. All right. Now, Temperate No. 3. I notice you have two locations on that claim.

A. Both pits are located in the southwest one-quarter of section 21 and the one pit is located 51 feet in a [24] northeasterly direction. The other pit 128 feet in a northeasterly direction from the southwest one-quarter—southwest corner of section 21.

Q. Let us mark those pits 1 and 2 so we can distinguish between them.

A. They are marked 1 and 2. The first one I read was pit No. 2 and the second one was pit No. 1.

Q. What is the dimension of pit No. 2?

A. 15 by 17 and pit No. 1 is 17 by 21. Pit No. 2 has 47.2 cubic yards and pit No. 1 53 cubic yards.

Q. When you say it has "cubic yards" you mean that is the number of yards removed from the pit?

A. Removed from the pit, yes, sir.

Q. Now, on Temperate No. 4.

A. There are two pits.

Q. I notice there are two pits there also.

A. They are in the southeast quarter of section 21. No. 1 is located 129 feet in a northwesterly direction and No. 2 is located 188 feet in a northwesterly direction from the southeast corner of section 21. The dimensions of pit

(Testimony of Eugene H. Imler)

No. 1 is 26 feet by 27 feet and cubic yards 80, and the dimensions of No. 2 is 24 by 26 feet and the cubic yardage is 86.6.

Q. Now, we move down to the claim known as Frigid No. 1. Give us the same information, reading it from the map on that. [25]

A. Frigid No. 1 is located in the northwest one-quarter of section 21. The pit is located 129 feet in a southeasterly direction from the northwest corner of section 29. Its dimensions are 27 by 27. It contained 125.5 cubic yards of excavation.

Q. Now, as to Frigid No. 2.

A. Located in the northeast one-quarter of section 29. The pit is located 97 feet in a southwesterly direction from the northeast corner of section 29. Its dimensions are 22 by 23 and it had an excavation of 93.7 cubic yards.

Q. Frigid No. 3?

A. Located in the southwest one-quarter of section 29. It is located 129 feet in a southeasterly direction from the west one-quarter corner of section 29. The dimensions are 23 by 25 and it contained 138.4 cubic yards of excavation.

Q. Frigid No. 4?

A. Located in the southwest one-quarter of section 29. Its location is 107 feet in a southwesterly direction from the quarter corner between 28 and 29. It was 26 by 26 feet in dimension and contained 100 cubic yards.

Q. Now, Tropical No. 1. There are two locations there I notice.

A. Both are located in the northwest one-quarter of section 28. No. 1 is a distance of 110 feet in a south-

(Testimony of Eugene H. Imler)

easterly direction. No. 2 is 187 feet in a southeasterly [26] direction. No. 1 is 16 by 31 feet containing 74 cubic yards. No. 2 is 19 by 22 and contains 47.1 cubic yards.

Q. Tropical No. 2?

A. Tropical No. 2 is in the northeast one-quarter of section 28. The pit is located 135 feet in a southwesterly direction from the northeast corner of section 28. Its dimensions are 25 by 26 and contained 33.7 cubic yards.

Q. Tropical No. 3?

A. It is in the southwest one-quarter of section 28, located 105 feet in a southeasterly direction from the quarter corner between 28 and 29. Its dimensions are 22 by 23 and it contained 63.7 yards of excavated material.

Q. Now, Tropical No. 4?

A. Tropical No. 4 is located in the southeast one-quarter of section 28. Its location is 77 feet in a southwesterly direction from the east one-quarter corner of section 28. The outside dimensions are 25 by 25 and it had 50.2 yards of excavated material.

Q. Thank you. You may resume the stand.

I believe you testified that you made the map?

A. I did—that is under my supervision.

Q. And it is a true representation of what you found on the property from your own personal examination and your field notes, is that correct?

A. That is correct. [27]

Mr. Hedges: We offer the map in evidence as Plaintiff's Exhibit 1, your Honor.

The Court: It may be admitted.

(Testimony of Eugene H. Imler)

The Clerk: Plaintiff's Exhibit 1 in evidence.

(The document referred to was thereupon marked Plaintiff's Exhibit 1 and admitted in evidence.)

Mr. Hedges: You may cross examine.

Mr. Painter: No cross examination as far as the defendant Hammond is concerned.

Mr. Wood: No examination.

Mr. Hedges: You may step down.

The Court: Call your next witness.

Mr. Hedges: Call Mr. Lewis.

HAROLD W. LEWIS,

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Harold W. Lewis.

Direct Examination

By Mr. Hedges:

Q. What is your address, Mr. Lewis?

A. Office or home?

Q. Both. [28]

A. Office is 606 Paramount Building and my home is 141 South Camden Drive, Beverly Hills.

Q. What is your business or profession?

A. I am with the Mineral Industries Corporation at the present time.

Q. I show you a document entitled "Acceptance of Stipulations, Reservations and Power of Attorney" which I have previously shown to counsel, and ask you whether or not you have seen that instrument before?

A. Yes, I have.

(Testimony of Harold W. Lewis)

Q. And was that handed to you by anyone?

A. By Mr. Houck.

Q. You refer to Mr. Stanley B. Houck, one of the plaintiffs in this action? A. I do.

Q. And what did you do with the instrument after it was handed to you? A. I filed it at El Centro.

Q. With the county recorder's office?

A. County recorder, yes.

Mr. Hedges: We offer this in evidence, if your Honor please, as Plaintiff's Exhibit 2.

The Court: It will be received.

(The document referred was thereupon marked Plaintiff's Exhibit No. 2 and received in evidence.) [29]

[PLAINTIFFS' EXHIBIT NO. 2]

ACCEPTANCE OF STIPULATIONS, RESERVATIONS AND POWER OF ATTORNEY

Know All Men By These Presents: That the undersigned of the County of Hennepin, State of Minnesota, jointly and severally, do by these presents make, constitute and appoint H. W. Lewis, of the County of Los Angeles, State of California, the true and lawful attorney in fact for them and each of them and in the name, place and stead of them and each of them to do all of the acts and things appropriate and necessary to the location of placer mineral claims in Sections 20, 21, 28 and 29, Township 14, South, Range 12 East, S.B.M., Imperial County, California, under and pursuant to the conditions, stipulations and regulations hereinafter stated and the provisions of the laws of the United States and of the State of

(Plaintiffs' Exhibit No. 2)

California and the performance of the required discovery work on and for said claims and the doing of any and all other acts and things in connection therewith which are appropriate under or required by the laws of the United States or the State of California and they and each of them hereby undertake and agree that each and all of the said claims which may be located, improved and developed by them or patented to them shall be at all times and in all respects subject to the following stipulations and to the regulations contained in Section 185.36 of Title 43 of the Code of Federal Regulations (Circular No. 1275, June 22, 1932, 53 I. D. 706) and that as locator or locators (hereinafter called Locator), of each of said claims they and each of them acknowledge, accept, agree and undertake that:

In carrying on the mining and/or milling operations contemplated hereunder locator will, by means of substantial dikes or other adequate structures, confine all tailings, debris and harmful chemicals in such a manner that the same shall not be carried beyond the herein described lands by storm waters or otherwise.

There is reserved to the United States, its successors and assigns the prior right to use any of the lands herein described to construct, operate, and maintain dams, dikes, reservoirs, canals, wasteways, laterals, ditches, telephone and telegraph lines, electric transmission lines, roadways, and appurtenant irrigation structures, without any payment made by the United States or its successors for such right, and the Locator agrees that if the construction of any or all of such dams, dikes, reservoirs, canals,

(Plaintiffs' Exhibit No. 2)

wasteways, laterals, ditches, telephone and telegraph lines, electric transmission lines, roadways, or appurtenant irrigation structures across, over, or upon said lands should be made more expensive by reason of the existence of improvements or workings of the Locator thereon, such additional expense is to be estimated by the Secretary of the Interior, whose estimate is to be final and binding upon the Locator and that within thirty days after demand is made upon the Locator for payment of any such sums, the Locator will make payment thereof to the United States or its successors constructing such dams, dikes, reservoirs, canals, wasteways, laterals, ditches, telephone and telegraph lines, electric transmission lines, roadways, or appurtenant irrigation structures across, over, or upon said lands. The Locator further agrees that the United States, its officers, agents, and employees and its successors and assigns shall not be held liable for any damage to the improvements or workings of the Locator resulting from the construction, operation, and maintenance of any of the works hereinabove enumerated. Nothing contained in this paragraph shall be construed as in any manner limiting other reservations in favor of the Locator. These stipulations shall be binding upon each of the undersigned as the Locator and his heirs, successors, and assigns.

hereby granting unto said attorney in fact, full power and authority to do everything and to perform and execute any and all other acts and things and to make, sign, execute, acknowledge, deliver and enter into any and all agree-

(Plaintiffs' Exhibit No. 2)

ments and instruments in writing necessary and incident to the performance and execution of the powers herein expressly granted with full power of substitution, delegation and revocation, and do hereby ratify and confirm all acts of said attorney in fact, which he or those appointed or delegated by him shall do legally in the performance and execution hereof.

In Witness Whereof, we have hereunto set our hands and seals this 30th day of August, 1945.

Ruby E. Edling	Minnie N. McKenzie
Ruby E. Edling	Minnie N. McKenzie
Wilna M. Sherard	Edward H. McKenzie
Wilna M. Sherard	Edward H. McKenzie
Hattie M. Houck	Stanley B. Houck
Hattie M. Houck	Stanley B. Houck
Ruth M. Hebbard	Veronica K. Ghostley
Ruth M. Hebbard	Veronica K. Ghostley

In the presence of:

Willard C. Lindsay

Ellis L. Bursell

State of Minnesota)
) SS
 County of Hennepin)

On this 30th day of August, 1945, before me personally appeared Ruby E. Edling, Wilna M. Sherard, Hattie M. Houck, Ruth M. Hebbard, Minnie N. McKenzie, Edward H. McKenzie, Stanley B. Houck and Veronica K. Ghostley, each of whom is known to me to be one of the persons described in and who executed the foregoing in-

(Plaintiffs' Exhibit No. 2)

strument, and each of whom acknowledged that he or she executed the same as his or her free act and deed.

(Seal)

Willard C. Lindsay

WILLARD C. LINDSAY

Notary Public, Hennepin County, Minn.

My Commission Expires Oct. 12, 1949.

Stanley B. Houck

1360 Northwestern Bank Bldg.

Minneapolis, Minn.

Recorded Sep 5 - 1945 4:55 PM in Book 624 Page
201 Official Records Imperial County Calif.

At Request of

Grantee..... Grantor..... Trustee.....

Mortgagee..... Mortgagor.....

H. W. Lewis

Sheriff..... Attorney..... Locator.....

Evalyn B. Westerfield County Recorder By Vera Rogers
Deputy

I certify that I have correctly transcribed this document
in above mentioned book. Julia M. Henderson Copyist

\$2.30 Indexed Compared Book & Paged

Case No. 6105-Y Civ. Hattie M. Houck et al. vs.
J. A. Jose. Plfs. Exhibit 2. Date Jun. 3, 1947. No. 2
in Evidence. Clerk, U. S. District Court, Sou. Dist. of
Calif. John A. Childress, Deputy Clerk.

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: I show you another instrument, which I have previously showed to counsel, entitled "Acceptance of Stipulations, Reservations and Power of Attorney" and ask you if you have ever seen that before?

A. I have, yes.

Q. And was that handed to you by someone?

A. By Mr. Stanley B. Houck.

Q. One of the plaintiffs in this action?

A. One of the plaintiffs.

Q. And I refer to page 2 of the instrument, at the bottom, where there appears to be in handwriting the wording: "I hereby delegate, substitute and appoint Wayne H. Hodgson for me and in my name and place and stead to execute and perform all of the powers conferred upon me by the foregoing instrument, dated September 6, 1945, and purporting to be signed H. W. Lewis, and purporting to be witnessed by the signatures of W. W. Bradshaw and V. G. Fulmer. Do you know whose handwriting that is?

A. That is my signature.

Q. The handwriting?

A. The handwriting is Mr. Houck's.

Q. Was that made in your presence?

A. I cannot say because I had been overcome by the heat.

Q. When was it placed on this document, if you know? [30]

A. It was on it the 6th of September.

Q. And you are familiar with the handwriting of Mr. Houck? A. Yes, sir.

Q. Or were before his death? A. Yes, sir.

Mr. Painter: I offer this as Plaintiff's Exhibit 3 for identification.

(Testimony of Harold W. Lewis)

The Court: It will be so marked.

The Clerk: Plaintiff's Exhibit 3 for identification.

(The document referred to was thereupon marked Plaintiff's Exhibit No. 3 for identification.)

Q. By Mr. Hedges: I show you another instrument, which I have previously shown counsel, entitled "Acceptance of Stipulations, Reservation and Power of Attorney" and ask you if you have ever seen that document before?

A. I have.

Q. And was it handed to you by someone?

A. Mr. Houck.

Q. Down at the bottom of page 2 in handwriting appears the wording: "I hereby delegate, substitute and appoint W. W. Bradshaw for me and in my name, place and stead to exercise and perform all of the powers conferred upon me by the foregoing instrument, in the presence of" and purporting to be the signature of Stanley B. Houck and a [31] signature purporting to be that of H. W. Lewis and dated September 6, 1945. I will ask you in whose handwriting the wording is.

A. That is Mr. Houck's writing.

Q. That is your signature at the bottom?

A. That is right.

Q. And that is the signature of Stanley B. Houck?

A. Yes, it is.

Mr. Hedges: I offer this as Plaintiff's next exhibit for identification.

(The document referred to was thereupon marked Plaintiff's Exhibit No. 4 for identification.)

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: I show you another instrument, which I have previously shown to counsel, entitled "Acceptance of Stipulations, Reservations and Power of Attorney," and ask you if you have ever seen that instrument before? A. Yes, I have.

Q. And by whom was that handed to you?

A. That was handed to me by Mr. Houck.

Q. On the second page of this instrument appears the wording: "I hereby delegate, substitute and appoint Howard H. Hough for me and in my name, place and stead to execute and perform all of the powers conferred upon me by the foregoing instrument, dated September 6, 1945, in the presence of" and purporting to be the signatures of W. W. Bradshaw and [32] V. G. Fulmer and signed by the signature purporting to be that of H. W. Lewis. I will ask you if that is your signature?

A. That is right.

Q. And the writing to which I have just referred is the handwriting of Mr. Houck? A. Yes.

Mr. Hedges: I offer this as Plaintiffs' next in order for identification.

The Clerk: Plaintiffs' Exhibit 5 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 5 for identification.)

Q. By Mr. Hedges: Mr. Lewis, I refer now to Plaintiffs' Exhibit 1 on the blackboard and ask you if you are familiar with that property? A. Yes, I am.

Q. When did you first become familiar with it subsequent to September 6, 19—that is on September 6th or subsequent thereto?

A. By that do you mean the first time I was ever on the property?

(Testimony of Harold W. Lewis)

Q. Subsequent to, let us say, the 5th of September.

A. I first went on the property in about 1942. I was on it many times after that up to September 6, 1945.

Q. All right. Were you on the property on September [33] 6, 1945?

A. I was.

Q. Was there anyone else with you at that time?

A. Mr. Stanley B. Houck and myself were there the morning of the 6th of September and there we met Mr. Wayne Hodgson, Mr. Hough, Mr. Fulmer and Mr. Bradshaw. I believe that was all early in the morning.

Later on there were some other people that came but they had no connection with the property.

Q. How did you go out to the property on that morning?

A. Drove out in an automobile.

Q. This is desert, semi-arid land, is it not?

A. It is.

Q. Did you have with you at the time you went out on the 6th of September any papers or documents?

A. We had a series of mining locations.

Q. I show you a document entitled "notice of location, placer claim," dated September 6, 1945 and ask you if you have ever seen this document before?

A. Yes.

Q. When did you first see it?

A. Those were made up in our office probably a week before we went down, other than the signatures.

Q. Just for the purpose of the record, each of these documents I have previously shown to counsel for the defend- [34] ants—I beg your pardon. What did you say?

A. I said the typewritten part was made up in the office maybe a week or 10 days before we went down, for this filing to be prepared.

(Testimony of Harold W. Lewis)

Q. You mean before you went down to the property?

A. Yes.

Q. Designated? A. Yes, on September 6.

Q. On the map? A. Yes, September 6.

Q. And at the bottom of the page, the first page of this notice appears a signature. Is that your signature—that is a series of signatures, H. W. Lewis. Are those your signatures? A. They are.

Q. And when did you affix your signatures to these instruments?

A. On the morning of the 6th of September.

Q. On the reverse side of the instrument also appears what purports to be the signature of H. W. Lewis, signing the instrument as attorney in fact for each of the parties named—Stanley B. Houck, Ruby E. Edling, Wilna M. Sherard, Hattie M. Houck, Ruth M. Hebbard, Minnie N. McKenzie, Edward H. McKenzie and Veronica K. Ghostley. Is that your signature?

A. The “H. W. Lewis” is my signature. [35]

Q. And you signed it? A. That is right.

Q. For the others? A. That is right, yes.

Mr. Painter: Just one second. I am going to ask the last statement of the witness: “I signed for them as attorney in fact” be stricken on the ground there is no foundation laid and it is a conclusion and opinion of the witness.

The Court: Oh, I don’t think so.

Mr. Hedges: The power of attorney is in evidence.

The Court: Objection is overruled.

Q. By Mr. Hedges: I now show you another document—

The Clerk: Is that to be marked?

(Testimony of Harold W. Lewis)

Mr. Hedges: Yes. I think we had better mark them.

Q. By Mr. Hedges: Did you cause this instrument to be recorded? A. I did.

Mr. Painter: Pardon me.

Mr. Wood: Are these being offered in evidence or for identification?

Mr. Hedges: I haven't made any offer of either yet.

Mr. Wood: Oh, I am sorry.

Q. By Mr. Hedges: Did you cause the instrument to be recorded in the county recorder's office of Imperial County? [36] A. I did.

Q. And on what date?

A. That one is on December 4, 1945.

Mr. Hedges: We offer this in evidence as plaintiffs' next in order.

Mr. Wood: To which we object on the ground no proper foundation has been laid.

The Court: Let me see it. The objection is overruled.

Mr. Painter: We have a further objection, if your Honor please. Mr. Wood had not finished his objection. I wanted to join in those objections and add to them if he didn't cover all of the objections. Will your Honor reserve your ruling until we finish that?

The Court: Yes, go ahead.

Mr. Wood: I want to object on the ground it is incompetent, irrelevant and immaterial and no showing, if your Honor please, that the power of attorney—no proper showing of proof of power of attorney and no showing the so-called parties whom he represented ever accepted his acts.

Mr. Painter: I want to join in those objections and add the further objection, if your Honor please, that it is

(Testimony of Harold W. Lewis)

a self-serving declaration for the statements in which there has been no foundation laid.

I would like to point out to the court that there is no evidence before the court that this instrument would have [37] been effective for the purpose recited therein on the date which it bears. In other words, the contention or evidence that these lands were open for entry on the 6th of September, 1945 has not been placed before your Honor in evidence.

The Court: That is a question to be determined from all the evidence. This merely shows a document which is recorded, a notice of location. What effect will be given to it will be determined later on. The objections are overruled. It may be received.

(The document referred to was marked Plaintiffs' Exhibit No. 6 and received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 6]

NOTICE OF LOCATION

Placer Claim

Notice Is Hereby Given: That the undersigned citizens of the United States, over the age of twenty-one years, in compliance with the requirements of Chapter VI, Title 32, of the revised Statutes of the United States and the local customs, laws and regulations, have this day located and claim the following described Placer Mining grounds, viz:

Northeast Quarter (NE $\frac{1}{4}$) of Section 28, Township 14 South, Range 12 East; S. B. B. & M.
together with all water and timber appurtenant, allowed by law, are hereby claimed.

(Plaintiffs' Exhibit No. 6)

This Claim consisting of 160 acres, or ----- number of feet claimed, shall be known as the Tropical No. 2 District, County of Imperial, State of California, Section 28. Township 14 South, Range 12 East, Meridan S. B. B. & M.

This Claim to be identified by its proximity to the following natural object or permanent monument, to-wit:
Surveyed land

Located this day of Sep 6 1945.

The date of the discovery and posting of this notice is the day of Sep 6 1945.

Locators:

Stanley B. Houck	Ruth M. Hebbard
By H. W. Lewis	By H. W. Lewis
Ruby E. Edling	Minnie N. McKenzie
By H. W. Lewis	By H. W. Lewis
Wilna M. Sherard	Edward H. McKenzie
By H. W. Lewis	By H. W. Lewis
Hattie M. Houck	Veronica K. Ghostley 12:10 P.M.
By H. W. Lewis	By H. W. Lewis Sept 6-1945

Witnesses

Howard H. Hough	Wayne H. Hodgson
12:11 P.M. Sept 6, 1945	12:13 P.M. Sept 6, 1945

The exterior boundaries of a Placer Claim cannot be limited by any local mining regulation to less than 25x1500 feet, measuring from the center of vein on either side.

Pub. Res. Code 2313, within ninety days after the posting of this notice of location upon a lode mining claim, placer claim, tunnel right or location, or mill site claim

(Plaintiffs' Exhibit No. 6)

or location, the locator shall record a true copy of the notice together with a statement of the markings of the boundaries as required in this chapter, and of the performance of the required discovery work, in the office of the county Recorder of the County in which such claim is situated.

STATEMENT OF THE MARKINGS OF THE BOUNDARIES

The markings of the boundaries of the aforesaid Claim as required by Section 2303 Public Resources Code, are designated and described as:

N.E. $\frac{1}{4}$ Sec 28 T 14 S R. 12 E S.B.B.M. Tropical #2.

STATEMENT OF DISCOVERY WORK PERFORMED

The locator has performed discovery work as required by Section 2304, Public Resources Code, as follows:

More than 10 cubic yards of material has been mined and moved

More than One Hundred Sixty Dollars has been spent in development work

Stanley B. Houck

Ruth M. Hebbard

Ruby E. Edling

Minnie N. McKenzie

Wilna M. Sherard

Edward H. McKenzie

Hattie M. Houck

Veronica K. Gostley

Locators

By H. W. Lewis—Their attorney in fact for each of them
Order No. 72

When recorded, please mail this instrument to.....

.....

(Plaintiffs' Exhibit No. 6)

Recorded Dec 4 1945 4:15 P.M. in Book 624, Page 270 Official Records Imperial County, Calif.

At Request of

Grantee..... Grantor..... Trustee.....

Mortgagee..... Mortgagor.....

H. W. Lewis

Sheriff..... Attorney..... Locator.....

Evalyn B. Westerfield, County Recorder By Evalyn B. Westerfield Deputy

I certify that I have correctly transcribed this document in above mentioned book. Bérénice R. Moden Copyist.

\$1.00 Indexed Compared Book & Paged

Case No. 6105-Y Civ. Hattie M. Houck, et al. vs. J. A. Jose, et al. Plfs. Exhibit No. 6. Date Jun. 3, 1947. No. 6 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. John A. Childress, Deputy Clerk.

Mr. Wood: In order that we do not unnecessarily interrupt, may the same objection be deemed to have been made as to these?

The Court: To the notices of location?

Mr. Wood: Yes.

The Court: All right.

Q. By Mr. Hedges: I show you next a document entitled "notice of location"—just a moment. In order that these may be properly identified, Plaintiffs' Exhibit No. 6 refers to the northeast quarter of section 28. Is that correct? A. That is.

Mr. Wood: Would you give it to us by claim name?

Mr. Hedges: Yes. The claim name is Tropical No. 2. [38]

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: Now, I show you a document purporting to be a notice of location affecting the south-east quarter of section 21, the claim being known as Temperate No. 4, and ask you if you have ever seen that instrument before? A. I have.

Q. The signatures appearing thereon as locaters by yourself, is that your signature? A. That is.

Q. And when did you sign that instrument?

A. The morning of the 6th of September.

Q. 19— A. 45.

Q. And the signature on the back of the instrument purporting to sign as attorney in fact for each of the plaintiffs in this action, is that your signature?

A. That is.

Q. H. W. Lewis? A. That is.

Mr. Hedges: I offer this as Plaintiff's exhibit next in order.

The Clerk: It will be received.

(The document referred to was thereupon marked Plaintiff's Exhibit No. 7 and received in evidence.)

The Clerk: Received in evidence subject to the objections made. [39]

Q. By Mr. Hedges: I now hand you an instrument purporting to be a notice of location affecting the north-west quarter of section 28—incidentally all of these are in township 14 south, range 12 east, S.B.B. & M. This claim purports—this claim is known as Tropical No. 1, is that correct? A. That is.

Q. And the signature appearing thereon, is that your signature? A. It is.

Q. Series of signatures? A. It is.

(Testimony of Harold W. Lewis)

Q. And when did you sign your name to this document? A. The morning of September 6th.

Q. 19— A. 45.

Q. And the signature appearing on the reverse side of the instrument, H. W. Lewis, "their attorney in fact for each of them," that is for each of the plaintiffs, is that your signature? A. It is.

Mr. Hedges: And the former exhibit, is that 7, Mr. Clerk? — The Clerk: Yes.

Q. By Mr. Hedges: No. 7 as well as this instrument, [40] were they both recorded on the same day?

A. They were.

Q. December 4, 1945? A. They were.

Mr. Hedges: Offer this as Plaintiff's exhibit next in order in evidence.

The Court: It may be received.

(The document referred to was thereupon marked Plaintiff's Exhibit No. 8 and received in evidence.)

Q. By Mr. Hedges: I now show you an instrument purporting to be a notice of location affecting the north-east quarter of section 29, known as Frigid No. 2 and ask you whether or not the signature H. W. Lewis appearing on that instrument—the signatures appearing there are your signatures? A. They are.

Q. And when did you sign or affix your name or your signatures to this instrument?

A. The morning of September 6, 1945.

Q. I refer to the reverse side of the instrument where the signature H. W. Lewis appears and I will ask you whether or not that is your signature? A. It is.

(Testimony of Harold W. Lewis)

Q. And when was that—strike that. Did you cause this instrument to be recorded in the recorder's office [41] of Imperial County? A. I did.

Q. On what date? A. December 4, 1945.

Mr. Hedges: I offer this as Plaintiffs' next in order.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 9 in evidence.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 9 and received in evidence.)

Q. By Mr. Hedges: I show you an instrument purporting to be a notice of locations affecting the southeast quarter of section 20, claim being known as Torrid No. 4, and ask you whether the signatures appearing on the bottom of the instrument, H. W. Lewis, are your signatures? A. They are.

Q. When did you affix your signatures to the instrument? A. The morning of September 6, 1945.

Q. And referring to the reverse side of the instrument where your name appears as attorney in fact I will ask you whether or not that is your signature?

A. It is.

Q. And did you cause this instrument to be recorded in the office of the county recorder of Imperial County?

A. I did. [42]

Q. On what date? A. December 4, 1945.

Mr. Hedges: I ask this be marked plaintiffs' exhibit next in order.

The Court: It will be received.

The Clerk: Plaintiffs' Exhibit 10 in evidence.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 10 and received in evidence.)

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: I show you another instrument purporting to be a notice of location affecting the southwest quarter of section 21, the claim being known as Temperate No. 3, and ask you whether the signatures at the bottom of the page, H. W. Lewis, are your signatures?

A. They are.

Q. And when did you sign the instrument?

A. The morning of the 6th of September, 1945.

Q. I refer to the reverse side of the instrument where it purports to be the signature H. W. Lewis, and ask you whether or not that is your signature? A. That is.

Q. Did you cause this instrument to be recorded in the county recorder's office of Imperial County?

A. I did.

Q. On what date? A. December 4, 1945. [43]

Mr. Hedges: I offer this as plaintiffs' next in order.

The Court: It will be received.

The Clerk: Plaintiffs' Exhibit 11 in evidence.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 11 and received in evidence.)

Q. By Mr. Hedges: I now show you an instrument purporting to be a notice of location affecting the southwest quarter of section 20, the claim being known as Torrid No. 3, and ask you whether or not the signatures appearing at the bottom of the document are your signatures? A. They are.

Q. And when did you so sign the instrument?

A. The morning of September 6, 1945.

Q. Referring to the signature of H. W. Lewis on the reverse side of the instrument, I will ask you whether or not that is your signature? A. Yes, sir, it is.

(Testimony of Harold W. Lewis)

Q. And did you cause this instrument to be recorded in the county recorder's office of Imperial County and if so on what date?

A. December 4, 1945 I recorded it.

Mr. Hedges: I offer this as plaintiffs' next in order.

The Court: It will be received.

The Clerk: Plaintiffs' Exhibit 12 in evidence.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 12 and received in evidence.) [44]

Q. By Mr. Hedges: I show you another instrument purporting to be a notice of location affecting the north-west quarter of section 29, the claim being known as Frigid No. 1, and ask you whether or not the signatures appearing at the bottom of that instrument are your signatures? A. They are.

Q. And if so when were they made?

A. The morning of September 6, 1945.

Q. Referring to the back side of the instrument where the signature H. W. Lewis appears, I will ask you whether or not that is your signature? A. It is.

Q. Did you cause this instrument to be recorded in the county recorder's office of Imperial County?

A. I did.

Q. What date? A. December 4, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order.

The Court: It will be received.

The Clerk: Plaintiffs' Exhibit 13 in evidence.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 13 and received in evidence.)

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: I show you a document purporting to be a notice of location affecting the northwest quarter of section 20 on the claim known as Torrid No. 1, and ask you [45] whether or not the signatures appearing on the bottom of that instrument are your signatures?

A. They are.

Q. And when did you so sign the instrument?

A. The morning of September 6, 1945.

Q. I show you the reverse side of the instrument where the signature H. W. Lewis appears, and ask you whether or not that is your signature? A. It is.

Q. And did you cause this instrument to be recorded in the county clerk's office—the county recorder's office of Imperial County and if so on what date?

A. December 4, 1945 I recorded it.

Mr. Hedges: I offer this as plaintiffs' next in order.

The Court: It will be received.

The Clerk: Plaintiffs' Exhibit 14 in evidence.

(The document referred to was thereupon marked Plaintiffs Exhibit 14 and received in evidence.)

Q. By Mr. Hedges: I show you what purports to be a notice of location affecting the northwest quarter of section 21, the claim known as Temperate No. 1—I have the wrong one here. Strike out the last question.

I show you an instrument purporting to be a notice of locations affecting the northwest quarter of section 21, claim known as Temperate No. 1, and ask you whether or not [46] you have ever seen that instrument before?

A. I have.

Q. And referring to the reverse side of said instrument are the signatures of H. W. Lewis—I will ask you whether or not that is your signature? A. It is.

(Testimony of Harold W. Lewis)

Q. Did you cause this instrument to be recorded in the county recorder's office of Imperial County?

A. I did on December 4, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order, for identification.

The Court: Very well.

The Clerk: Plaintiffs' Exhibit 15 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 15 for identification.)

Q. By Mr. Hedges: I show you a notice of location affecting the southeast quarter of section 29, the claim known as Tropical No. 4. Have you ever seen that instrument before? A. I have.

Q. Referring to the reverse side of said instrument where the signature H. W. Lewis appears, I will ask you whether or not that is your signature? A. It is.

Q. Did you cause this instrument to be recorded in [47] the county recorder's office? A. I did.

Q. Of Imperial County? A. I did.

Q. On what date? A. December 4, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order for identification.

The Court: All right.

The Clerk: Plaintiffs Exhibit 16 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 16 for identification.)

Q. By Mr. Hedges: I show you an instrument purporting to be a notice of location affecting the northeast quarter of section 20 on a claim known as Torrid No. 2 and ask you whether or not you have ever seen this instrument before? A. I have.

(Testimony of Harold W. Lewis)

Q. And referring to the reverse side of the instrument there appears the signature of H. W. Lewis. Is that your signature? A. That is.

Q. Did you cause this instrument to be recorded with the county recorder of Imperial County? A. I did.

Q. On what date? [48]

A. December 4, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order for identification.

The Court: Very well.

The Clerk: Plaintiffs Exhibit 17 for identification.

(The document referred to was thereupon marked Plaintiffs Exhibit No. 17 for identification.)

Q. By Mr. Hedges: I show you an instrument purporting to be a notice of location affecting the southwest quarter of section 28 on the claim known as Tropical No. 3, and ask you whether you have ever seen this instrument before? A. I have.

Q. Referring to the reverse side and to the signature H. W. Lewis, is that your signature? A. It is.

Q. Did you cause this instrument to be recorded in the office of the recorder for Imperial County?

A. I did.

Q. When? A. December 4, 1945.

Mr. Hedges: I offer this for identification.

The Court: All right.

The Clerk: Plaintiffs' Exhibit 18 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 18 for identification.) [49]

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: I show you an instrument purporting to be a notice of location affecting the southeast quarter of section 29 on the claim known as Frigid No. 4, and ask you whether or not you have ever seen that document before? A. I have.

Q. Referring to the reverse side of the document, where the signature appears, H. W. Lewis, I will ask you whether or not that is your signature? A. It is.

Q. And did you cause this instrument to be recorded in the office of the county recorder for Imperial County?

A. I did.

Q. On what date? A. December 4, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order for identification.

The Court: Very well.

The Clerk: Plaintiffs Exhibit 19 for identification.

(The document referred to was thereupon marked Plaintiffs Exhibit No. 19 for identification.)

Q. By Mr. Hedges: I show you what purports to be a notice of location affecting the northeast quarter of section 21 on a claim known as Temperate No. 2, and ask you whether or not you have ever seen that instrument before? A. I have. [50]

Q. Referring to the reverse side of the instrument where the signature H. W. Lewis appears, I will ask you whether or not that is your signature? A. It is.

Q. Did you cause this instrument to be recorded in the office of the county recorder of Imperial County?

A. I did.

Q. On what date? A. December 4, 1945.

(Testimony of Harold W. Lewis)

Mr. Hedges: I offer this as plaintiffs' next in order for identification.

The Court: Very well.

The Clerk: Plaintiffs' Exhibit 20 for identification.

(The document referred to was thereupon marked Plaintiffs Exhibit No. 20 for identification.)

Q. By Mr. Hedges: I show you an instrument entitled notice of location affecting the southwest quarter of section 29 on a claim known as Frigid No. 3, and ask you whether or not you have ever seen that instrument before? A. I have.

Q. Referring to the reverse side of the instrument where the signature appears, H. W. Lewis, I will ask you whether or not that is your signature? A. It is.

Q. And did you cause this instrument to be recorded [51] in the office of the county recorder of Imperial County? A. I did.

Q. On what date? A. December 4, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order for identification.

The Clerk: Plaintiffs' Exhibit 21 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 21 for identification.)

Q. By Mr. Hedges: I show you an instrument entitled notice of location affecting the southeast quarter of section 21 on a claim known as Temperate No. 4, dated September 7, 1945, and ask you whether or not you have ever seen that instrument? A. I have.

Q. I refer to the reverse side of the instrument where there appears the signature of H. W. Lewis and ask you whether or not that is your signature? A. It is.

(Testimony of Harold W. Lewis)

Q. And did you cause that instrument to be recorded in the county recorder's office of Imperial County?

A. Yes, sir.

Q. On what date? A. December 4, 1945. [52]

Mr. Hedges: I offer this as plaintiffs next in order for identification.

The Court: It will be so marked.

The Clerk: Plaintiffs Exhibit 22 for identification.

(The document referred to was thereupon marked Plaintiffs Exhibit No. 22 for identification.)

Q. By Mr. Hedges: I show you what purports to be a notice of location affecting the southeast quarter of section 20 on a claim known as Torrid No. 4, dated September 7, 1945, which signature is H. W. Lewis appearing at the bottom and I will ask you whether or not the signature appearing at the bottom are your signatures?

A. They are.

Q. And when did you sign the document?

A. Those were signed September 7, 1945.

Q. Referring to the reverse side of the instrument where there appears the signature H. W. Lewis, I will ask you whether or not that is your signature?

A. It is.

Q. And did you cause this instrument to be recorded in the county recorder's office of Imperial County?

A. I did.

Q. On what date? A. December 5, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order [53] in evidence.

Mr. Painter: If your Honor please, we want to renew our objection to the introduction in evidence of the

(Testimony of Harold W. Lewis)

instruments which counsel has now started to introduce, being dated the 7th of September, 1945 and if we may do so without re-stating our grounds that were made to the introduction to the instruments dated September 6, 1945.

The Court: All right. The objection is overruled.

The Clerk: Plaintiffs' Exhibit 23 in evidence.

(The document referred to was thereupon marked Plaintiffs' Exhibit 23 and received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 23]

NOTICE OF LOCATION

Placer Claim

Notice Is Hereby Given: That the undersigned citizens of the United States, over the age of twenty-one years, in compliance with the requirements of Chapter VI, Title 32, of the revised Statutes of the United States and the local customs, laws and regulations, have this day located and claim the following described Placer Mining grounds, viz:

Southeast quarter (SE $\frac{1}{4}$) of Section 20, Township 14 South, Range 12 East, S. B. B. & M.

together with all water and timber appurtenant, allowed by law, are hereby claimed.

This Claim consisting of 160 acres, or ----- number of feet claimed, shall be known as the Torrid No. 4 District, County of Imperial, State of California, Section 20, Township 14 South, Range 12 East, Meridian S. B. B. & M.

(Plaintiffs' Exhibit No. 23)

This Claim to be identified by its proximity to the following natural object or permanent monument, to-wit:

Surveyed land

Located This 7th day of Sept, 1945

The date of the discovery and posting of this notice is the 7 day of Sept, 1945.

Locators:

Stanley B. Houck	Ruth M. Hebbard
By H. W. Lewis	By H. W. Lewis
Ruby E. Edling	Minnie N. McKenzie
By H. W. Lewis	By H. W. Lewis
Wilna M. Sherard	Edward H. McKenzie
By H. W. Lewis	By H. W. Lewis
Hattie M. Houck	Veronica K. Ghostley
By H. W. Lewis	By H. W. Lewis 10.01 A.M.

Witnesses

W. W. Bradshaw

The exterior boundaries of a Placer Claim cannot be limited by any local mining regulation to less than 25x1500 feet, measuring from the center of vein on either side.

Pub. Res. Code 2313, within ninety days after the posting of this notice of location upon a lode mining claim, placer claim, tunnel right or location, or mill site claim or location, the locator shall record a true copy of the notice together with a statement of the markings of the boundaries as required in this chapter, and of the performance of the required discovery work, in the office of the County Recorder of the County in which such claim is situated.

(Plaintiffs' Exhibit No. 23)

STATEMENT OF THE MARKINGS OF THE BOUNDARIES

The markings of the boundaries of the aforesaid Claim as required by Section 2303 Public Resources Code, are designated and described as:

SE $\frac{1}{4}$ Sec 20 T 14 S R 12 E S. B. B. & M. Torrid
#4

STATEMENT OF DISCOVERY WORK PERFORMED

The locator has performed discovery work as required by Section 2304, Public Resources Code, as follows:

More than 10 cubic yards of material has been mined and moved

More than One Hundred Sixty Dollars has been spent in development work

Stanley B. Houck

Ruth M. Hebbard

Ruby E. Edling

Minnie N. McKenzie

~~Wilma M. Houck~~

Edward H. McKenzie

Wilma M. Sherard

Veronica K. Gostley

Hattie M. Houck

Locators

By H. W. Lewis—Their attorney in fact for each of them.

Order No. 10

When recorded, please mail this Instrument to
Stanley B. Houck
1360 Northwestern Bank Bldg.,
Minneapolis, Minn.

Recorded Dec 5 1945 9:30 A.M. in Book 624, Page
275 Official Records Imperial County, Calif.

(Plaintiffs' Exhibit No. 23)

At Request of

Grantee..... Grantor..... Trustee.....

Mortgagee..... Mortgagor.....

H. W. Lewis

Sheriff..... Attorney..... Locator.....

Evalyn B. Westerfield, County Recorder By Vera Rogers Deputy

I certify that I have correctly transcribed this document in above mentioned book. Jo Stevens Copyist

\$1.00 Indexed Compared Book & Paged

Case No. 6105-Y Civ. Hattie M. Houck vs. J. A. Jose et al. Plfs Exhibit 23. Dated Jun. 3, 1947. No. 23 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. John A. Childress, Deputy Clerk.

Q. By Mr. Hedges: I show you an instrument entitled notice of location affecting the northeast quarter of section 28, the claim known as Tropical No. 2, and ask you whether or not you have ever seen that instrument before? A. I have.

Q. Referring to the reverse side of the instrument where there appears the signature of H. W. Lewis, I will ask you whether or not that is your signature?

A. It is.

Q. Did you cause this instrument to be recorded in the county recorder's office of Imperial County?

A. I did.

Q. What date? A. December 4, 1945. [54]

Mr. Hedges: I offer this as plaintiffs' next in order for identification.

The Court: All right.

The Clerk: Plaintiffs' Exhibit 24 for identification.

(Testimony of Harold W. Lewis)

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 24 for identification.)

Q. By Mr. Hedges: I now show you a document entitled notice of location affecting the southwest quarter of section 21 on a claim known as Temperate No. 3, dated September 7, 1945, and ask you whether or not the signatures, H. W. Lewis, appearing at the bottom of that document are your signatures? A. They are.

Q. When did you sign the document?

A. The morning of the 7th of September, 1945.

Q. Referring to the reverse side of the instrument where appears the signature H. W. Lewis, I will ask you whether or not that is your signature? A. It is.

Q. You caused this instrument to be recorded in the county recorder's office of Imperial County?

A. I did.

Q. On what date? A. December 5, 1945.

Mr. Hedges: We offer this as plaintiffs' exhibit next in order in evidence. [55]

The Court: It will be received.

The Clerk: Plaintiffs Exhibit 25 in evidence.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 25 and received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 25 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 25, H. W. Lewis has signed as the party who has posted for the locators, with the hour being written in as 10:05 o'clock A. M., and Howard W. Hough and Wayne H. Hodgson have signed as witnesses to the posting of the Notice.]

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: Now, I show you an instrument entitled notice of location affecting the southwest quarter of section 28 on a claim known as Tropical No. 3, dated September 7, 1945, and ask you whether or not you have ever seen that instrument before?

A. Yes, I did.

Q. Referring to the reverse side of the instrument where appears the signature H. W. Lewis, I will ask you whether or not that is your signature? A. It is.

Q. Did you cause this instrument to be recorded in the county recorder's office of Imperial County and if so on what date? A. December 4, 1945.

Mr Hedges: I offer this as plaintiffs' next in order for identification.

The Court: Very well.

The Clerk: Plaintiffs' 26 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 26 for identification.)

Q. By Mr. Hedges: Now, I show you a notice of—a [56] document entitled notice of location affecting the southeast quarter of section 29 on a claim known as Frigid No. 4, and ask you whether or not—strike that. And dated September 7, 1945, and ask you whether or not you have ever seen this instrument before?

A. I have.

Q. Referring to the reverse side of the instrument where appears the signature H. W. Lewis, I will ask you whether or not that is your signature? A. It is.

Q. Did you cause this instrument to be recorded in the county recorder's office of Imperial County?

A. I did.

(Testimony of Harold W. Lewis)

Q. On what date? A. December 4, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order for identification.

The Court: Very well.

The Clerk: Plaintiffs' Exhibit 27 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 27 for identification.)

Q. By Mr. Hedges: Now, I show you an instrument entitled notice of location affecting the northwest quarter of section 21 on a claim known as Temperate No. 1, dated September 7, 1945 and ask you whether or not you have ever [57] seen this instrument before?

A. I have.

Q. Referring to the reverse side of the instrument where appears the signature of H. W. Lewis, I will ask you whether or not that is your signature?

A. It is.

Q. And did you cause this instrument to be recorded in the county recorder's office? A. I did.

Q. Of Imperial County? A. I did.

Q. On what date? A. December 4, 1945.

Mr. Hedges: I offer this next in order for identification.

The Court: It will be so marked.

The Clerk: Plaintiffs' Exhibit 28 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 28 for identification.)

Q. By Mr. Hedges: I show you now what purports to be a notice of location affecting the northwest quarter of section 20 on a claim known as Torrid No.—it is the

(Testimony of Harold W. Lewis)

northeast quarter of section 20 on a claim known as Torrid No. 2, and ask you whether or not the signatures appearing at the bottom of the first page are your signatures? A. They are. [58]

Q. When did you sign the instrument?

A. The morning of September 7, 1945.

Q. And is the instrument dated September 7, 1945?

A. Dated September 7.

Q. Referring to the reverse side of the instrument where appears the signature H. W. Lewis, I will ask you whether or not that is your signature? A. It is.

Q. And did you cause this instrument to be recorded in the county recorder's office of Imperial County?

A. I did.

Q. On what date? A. December 4, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order in evidence.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 29 in evidence.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 29 and received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 29 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 29, H. W. Lewis has signed as the party posting the Notice of Location, with the hour being written in as 11:01 o'clock A. M., and there are no witnesses to said posting who have signed thereon.]

Q. By Mr. Hedges: I now show you a document entitled notice of location affecting the northwest quarter of

(Testimony of Harold W. Lewis)

section 28 on a claim known as Tropical No. 2, the claim being dated September 7, 1945, and I will ask you whether or not the signature appearing at the bottom of the page—the signatures are your signatures? [59]

A. They are.

Q. When did you sign the document?

A. The morning of September 7, 1945.

Q. Referring to the reverse side of the instrument where appears the signature H. W. Lewis, I will ask you whether or not that is your signature?

A. It is.

Q. Did you cause this instrument to be recorded in the office of the county recorder of Imperial County?

A. I did.

Q. On what date? A. December 4, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order in evidence.

The Court: It will be received.

The Clerk: Plaintiffs' Exhibit 30 in evidence.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 30 and received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 30 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 30, H. W. Lewis has signed as the party posting the Notice of Location, with the hour being written in as 11:04 o'clock A. M., and there are no witnesses to said posting who have signed thereon.]

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: I show you a document entitled notice of location affecting the northeast quarter of section 29 on a claim known as Frigid No. 2, dated September 7, 1945, and ask you whether or not the signatures appearing at the bottom of the document are your signatures? A. They are.

Q. Referring to the reverse side of the instrument [60] where the signature H. W. Lewis appears, I will ask you whether or not that is your signature?

A. It is.

Q. And did you cause this instrument to be recorded in the county recorder's office of Imperial County?

A. I did.

Q. On what date? A. December 4, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order in evidence.

The Court: It will be received.

The Clerk: Plaintiffs' Exhibit 31 in evidence.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 31 and received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 31 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 31, H. W. Lewis has signed as the party posting the Notice of Location, with the hour being written in as 11:05 o'clock A. M., and W. W. Bradshaw signed as witness to said posting, the hour being 11:05 o'clock A. M.]

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: I show you an instrument entitled notice of location affecting the southeast quarter of section 28, known as Tropical No. 4, dated September 7, 1945, and ask you whether or not you have ever seen that instrument before? A. I have.

Q. Referring to the reverse side of the instrument where it appears the signature H. W. Lewis, I will ask you whether or not that is your signature?

A. It is.

Q. And did you cause this instrument to be recorded in [61] the county recorder's office of Imperial County?

A. I did.

Q. On what date? A. December 4, 1945.

Mr. Hedges: I offer this as plaintiffs' next in order for identification.

The Court: Very well.

The Clerk: Exhibit 32 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit No. 32 for identification.)

Q. By Mr. Hedges: I show you an instrument entitled notice of location affecting the northeast quarter of section 21 on a claim known as Temperate No. 2, dated September 7, 1945, and ask you whether or not you have ever seen that instrument before? A. I have.

Q. Referring to the reverse side of the instrument where appears the signature H. W. Lewis, I will ask you whether or not that is your signature?

A. It is.

Q. And did you cause this instrument to be recorded in the county recorder's office of Imperial County?

A. I did.

(Testimony of Harold W. Lewis)

Q. On what date? A. December 4, 1945. [62]

Mr. Hedges: I offer this as plaintiffs' next in order for identification.

The Court: It may be marked for identification.

The Clerk: Plaintiffs' Exhibit 33 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit 33 for identification.) [62-a]

Q. By Mr. Hedges: I show you an instrument entitled Notice of Location affecting the Southwest Quarter of Section 20 on a claim known as Torrid No. 3, dated September 7th, 1945, and I will ask you whether or not you have ever seen that instrument before.

A. I have.

Q. Referring to the reverse side of the instrument where the signature appears, H. W. Lewis, is that your signature? A. It is.

Q. Did you cause this instrument to be recorded in the County Recorder's office of Imperial County?

A. I did.

Q. On what date? A. December 4th, 1945.

Mr. Hedges: I offer this as Plaintiffs' next in order for identification.

The Court: Very well.

The Clerk: Plaintiffs' Exhibit 34 for identification.

(The document referred to was marked as Plaintiffs' Exhibit 34, for identification.)

Q. By Mr. Hedges: I show you now a notice of location affecting the Northwest Quarter of Section 29 on a claim known as Frigid No. 1, dated September 7th, 1945, and ask you whether or not you have ever seen that instru-[63] ment before? A. I have.

(Testimony of Harold W. Lewis)

Q. Referring to the reverse side of the instrument where the signature H. W. Lewis appears, is that your signature? A. It is.

Q. Did you cause this instrument to be recorded in the County Recorder's office of Imperial County?

A. I did.

Q. On what date? A. December 4th, 1945.

Mr. Hedges: I offer this as Plaintiffs' next in order for identification.

The Court: It may be so marked.

The Clerk: Plaintiffs' Exhibit 35 for identification.

(The document referred to was marked as Plaintiffs' Exhibit 35, for identification.)

Q. By Mr. Hedges: I show you an instrument entitled Notice of Location affecting the Northwest Quarter of Section 20 on a claim known as Torrid No. 1, dated September 7th, 1945, and ask you whether or not you have ever seen that instrument before? A. I have.

Q. Referring now to the reverse side of the instrument where appears the signature H. W. Lewis, is that your signature? [64] A. It is.

Q. Did you cause this instrument to be recorded in the County Recorder's office of Imperial County?

A. I did.

Q. And on what date? A. December 4th, 1945.

Mr. Hedges: I offer this as Plaintiffs' next in order for identification.

The Court: Very well.

The Clerk: Plaintiffs' Exhibit 36 for identification.

(The document referred to was marked Plaintiffs' Exhibit 36, for identification.)

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: Now, I show you an instrument entitled Notice of Location affecting the Southwest Quarter of Section 29, on a claim known as Frigid No. 3, dated September 7th, 1945, and ask you whether or not you have ever seen that instrument before? A. I have.

Q. Referring to the reverse side of the instrument where the signature H. W. Lewis appears, is that your signature? A. It is.

Q. Did you cause this instrument to be recorded in the County Recorder's office of Imperial County?

A. I did. [65]

Q. On what date? A. December 4th, 1945.

Mr. Hedges: I offer this as Plaintiffs next in order for identification.

The Court: Very well.

The Clerk: Plaintiffs' Exhibit 37 for identification.

(The document referred to was marked as Plaintiffs' Exhibit 37 for identification.)

The Court: We will take a short recess at this time.

(Short recess.)

The Court: You may proceed.

Q. By Mr. Hedges: Now, Mr. Lewis, you have previously testified that you went out to the property described in Plaintiffs' Exhibit 1, the map on the board. I believe you said that was around seven o'clock in the morning of the 6th of September, 1945?

A. We were there at seven o'clock.

Q. You were on the property at seven o'clock?

A. On the property at seven o'clock.

Q. And what did you do when you went upon the property?

(Testimony of Harold W. Lewis)

Mr. Painter: Object to that, if your Honor please, on the ground it is irrelevant and immaterial insofar as the 6th of September, 1945 is concerned.

The Court: Overruled.

Mr. Painter: It proves no issue in this case [66]

The Court: Overruled.

Q. By Mr. Hedges: Will you answer the question?

A. Well, we first drove along the main highway, that graveled road—

Mr. Wood: Will you speak up so we can hear you?

The Witness: We first traveled along the main road and met the surveying crew.

Q. By Mr. Hedges: Will you indicate on the map where the main road is? I notice it is not shown on here.

A. I can't see it from here.

Q. Come right down.

A. It is between Section 29 and 20. This is the highway between 29 and 20 and 21 and 28. It runs right along the section line.

Q. That is a dirt road through there, is that right?

A. Gravel road.

Q. Proceed.

A. We drove out there and we met Mr. Hough and Mr. Hodgson and we started locating the corners, the Government survey corners.

Q. General Land Office stakes?

A. U. S. G. S. Stakes. They are iron pipes with a bronze top, I would say about two and a half inches in diameter.

Q. The ones to which Mr. Imler referred? [67]

A. Yes.

(Testimony of Harold W. Lewis)

Q. All right. What else did you do?

A. We waited for them to locate their corners. That took several hours. I don't recall how long but it took some time. And around noon we started making our locations.

Q. All right. Now, I show you Plaintiffs' Exhibit 6 in evidence and ask you if you had that in your possession at the time to which you now refer? A. Yes.

Q. And did you have more than one of those instruments?

A. Mr. Houck had all of them in a portfolio set out in—as I recall, there were four portfolios with each section and they were divided into the smaller parts in his portfolio. I can't recall whether or not if you mean a lot of them in my hand.

Q. Did you have more than one of these instruments, Exhibit 6, in your possession at that time?

A. We had two of each one because we put one—

Q. In other words, you had two in your possession at that time? A. Yes, sir.

Mr. Painter: Mr. Hedges, will it be understood, if your Honor please, our objection goes to each and every question which relates to anything done on the 6th of September, 1945, without repeating the objections? [68]

The Court: Yes.

Mr. Hedges: I think you might state, counsel, the reason for your objection. Maybe the court would be a little more clear on it and then we would all understand it.

Mr. Painter: I believe it would be proper at this time. It is the position of the defendants and cross-complainant Hammond, et al., that the property involved in this action was not open for entry until September 7th.

(Testimony of Harold W. Lewis)

The Court: I understood your objection to be that.

Mr. Hedges: Very well; all right.

Q. By Mr. Hedges: You had Plaintiffs' Exhibit 6 in your hand and also a duplicate of it, is that right?

A. That is correct.

Q. Now, what did you do at about noon, as you have testified, with this instrument, Plaintiffs' Exhibit 6, if anything?

A. We had for each location—for each location we had a board about four inches wide and about four feet long on which we had marked the name of it, the legal description of the claim, the name of the claim. That was put into the ground.

Q. You are referring to a stake now?

A. A stake.

Q. With this matter printed on the part—

A. Painted on with black paint. And when the duplicate lease—location notice was placed in a pint mason [69] jar at the base of that post.

Q. Well, did you go right to the location specified in Plaintiffs' Exhibit 6, Tropical No. 2? A. I did.

Q. On the morning of September 6th?

A. Around noon.

Q. Now, when you got to that location—and is that the location that is specified on Plaintiffs' Exhibit 1 on the blackboard, Tropical No. 2?

A. Northeast Quarter of Section 28. It would be that one to the right.

Q. You went to this location, referring to Tropical No. 2 on Plaintiffs' Exhibit 1? A. That is right.

(Testimony of Harold W. Lewis)

Q. What did you do—strike that. What time did you arrive at that location?

A. Well, it must have been shortly after lunch, the noon hour, because it took all the morning to prepare our work, so it was around twelve o'clock according to this.

Q. And was there anyone with you at that time?

A. According to the witnesses here Howard Hough and Wayne Hodgson.

Q. Do you recall of your own knowledge that they were with you at that time?

A. I think they were. [70]

Q. Now, when you got to the location tell us just exactly what you did physically on the property?

A. Physically we drove a post which was roughly four inches wide and four feet long that had been painted prior to that time with the name of the lease, the legal description of the lease and then we dug a small hole, probably five inches in diameter, and we placed a Mason jar in that hole and put the duplicate of this in, if that is the duplicate.

Q. The duplicate of Plaintiffs' Exhibit 6?

A. That is right.

Q. Placed in the jar? A. Yes.

Q. And the cap put back on?

A. Yes, the cap put back on.

Q. Just prior to the time you placed the duplicate of this instrument in the jar did you do anything with this instrument and the duplicate?

A. We would date it and time it.

Q. Don't say what you would do. What did you do?

A. We dated it, we timed it and we witnessed it.

(Testimony of Harold W. Lewis)

Q. Did you sign it at that time?

A. We signed it at that time.

Q. In other words, you signed the names of each of the plaintiffs in this action by yourself, timed the instrument and marked it twelve o'clock? [71]

A. No, I think we signed those before we went out there during the morning. We signed those up and then we—so far as my power of attorney went I signed my name in the morning and then when we arrived at the location we put in the post, we put in the Mason jar, we put the duplicate in the Mason jar and then witnesses were placed on there with the time.

Q. Did you time it at that time just prior to placing it in the Mason jar? A. We did.

Q. And what time did you mark on it?

A. 12:10 p.m., September 6th, 1945.

Q. All right. Now, at the time you marked that, designated that time upon the instrument, did Mr. Howard Hough and Mr. Wayne Hodgson witness the locating of the claim? A. They did.

Q. And so signed their names.

A. So signed their names.

Q. In the presence of—

A. In my presence and put the time on it.

Q. Now, I show you Plaintiffs' Exhibit 7 in evidence and ask you what you did with that instrument on the morning of September 6th, 1945?

A. That would have been in Section 21 and that was the Southeast Quarter. That would be the lower right-hand [72] quarter. That would be the lower right-hand quarter of Section 21.

(Testimony of Harold W. Lewis)

Q. Referring to Temperate No. 4 on Plaintiffs' Exhibit 1? A. Temperate No. 4, that is right.

Q. Now, there are two locations designated on the map. Do you recall which one of those two locations this claim was used on?

A. No, I don't. We did—went through the same procedure and made our location and those two holes that were dug later on, I don't think had any bearing as to the filing of this.

Q. What you did was post—what you did was drive your stake into the ground giving the location?

A. That is right.

Q. And placing the duplicate instrument in the glass jar? A. That is right.

Q. At a point approximately where those appear?

A. Where the locations are.

Q. On Temperate No. 4 on the map, is that correct?

A. That is right.

Q. And was this the next location that you made after you made the first one, Plaintiffs' Exhibit 6?

A. It was. [73]

Q. All right. And what time did you arrive at that location?

A. 12:17. I signed it. I signed it at 12:17.

Q. And did you post—strike that. Did you place the duplicate of Plaintiffs' Exhibit 7 in the glass jar at the base of the stake at that time? A. I did.

Q. At 12:17 p.m.? A. Yes, sir.

Q. September 6th?

A. September 6th, 1945, I did.

(Testimony of Harold W. Lewis)

Q. And did Mr. Howard Hough and Mr. Wayne Hodgson witness the placing of that in that location at that time? A. They did.

Q. I show you Plaintiffs' Exhibit 8 and ask you what you did with that instrument and the duplicate instrument, if there was one?

A. There was one. We went through the same procedure as we had done on the previous two. We signed them, we dated them. We timed them and they witnessed it and the duplicate was placed in the Mason jar.

Q. What time did you place the duplicate of this instrument in the Mason jar? A. 12:30.

Q. p.m.? [74]

A. p.m. September 6th, 1945.

Q. And did Mr. Howard Hough and Mr. Wayne Hodgson witness the placing of the duplicate in the Mason jar? A. They did.

Q. At that time? A. They did.

Q. I notice that they also have timed—

A. Their signatures.

Q. Their signatures. Mr. Hough at 12:32 and Mr. Hodgson at 12:30, is that correct?

A. That is correct.

Q. Now, I show you Plaintiffs' Exhibit 9 in evidence and ask you what you did with that instrument and the duplicate thereof, if there was a duplicate?

A. We drove a stake. We took the duplicate. We signed the time. It was witnessed and it was placed in the Mason jar and the time was 12:35 p.m., September 6th, 1945.

(Testimony of Harold W. Lewis)

Q. And that is Frigid No. 2 which is in this location on the map, Plaintiffs' Exhibit 1, is that right?

A. That would be the Northeast Quarter of Section 29, that is correct.

Q. And you placed the duplicate of Plaintiffs' Exhibit 9 in the Mason jar at 12:30 p.m., September 6th, 1945, is that correct?

A. They were placed in immediately after they signed [75] as witnesses and they put their time on and then it was put in the Mason jar.

Q. And did Mr. Howard Hough and Mr. Wayne Hodgson witness the placing of the duplicate of that instrument in the Mason jar? A. They did.

Q. And at the times specified on the instrument, 12:38 p.m. for Mr. Hough, and 12:38 p.m. for Mr. Hodgson?

A. That is right.

Q. All right. I show you Plaintiffs' Exhibit 10 in evidence, and ask you what you did with that instrument and the duplicate of it, if there was one, on September 6th, 1945?

A. Northeast Quarter of Section 20 that would be.

Q. Torrid No. 1 on the map, Plaintiffs' Exhibit 1?

A. That is right. We went through exactly the same procedure. We drove the post which had been marked, we signed it, we witnessed the signatures, placing the time on it, and then we put them in the Mason jar.

Q. What time did you post the duplicate of this notice of location in the Mason jar? A. 12:42.

Q. On September 6th?

A. September 6th, 1945.

(Testimony of Harold W. Lewis)

Q. Did Mr. Wayne Hodgson and Mr. Howard Hough witness the placing of the duplicate instrument in the Mason jar? [76] A. They did.

Q. And at approximately the time specified thereon?
A. They did.

Q. 12:43 for Mr. Hodgson? A. That is right.

Q. And 12:44 for Mr. Hough?

A. That is right.

Q. I show you Plaintiffs' Exhibit 11 in evidence and ask you what you did with that instrument and the duplicate thereof, if there was one, on September 6th?

A. That is the Southwest Quarter of Section 21.

Q. Temperate No. 3?

A. That is right. We did exactly the same thing, followed the same procedure; putting the duplicate in the Mason jar after it had been witnessed and the time recorded.

Q. All right. And what time did you place that in the Mason jar, the duplicate of this Plaintiffs' Exhibit 11 in evidence?

A. I signed it at 12:45 p.m., September 6th, 1945. They signed it at 12:46 p.m., September 6th, 1945.

Q. You say "they." You mean Howard Hough and Mr. Hodgson?

A. Mr. Hough and Mr. Hodgson, that is right.

Q. I show you Plaintiffs' Exhibit 12 in evidence, and ask you what you did with that instrument and the duplicate [77] thereof, if there was one, on September 6th, 1945?

A. There was a duplicate. It was placed in the jar—the same procedure that had been followed.

(Testimony of Harold W. Lewis)

Q. We are referring now to Torrid No. 3, is that correct? A. Torrid No. 3.

Q. Right down here on the map, Plaintiffs' Exhibit 1?

A. That is right. The duplicate was put in the jar after it had been witnessed and the time recorded, 12:55 p.m., September 6th, 1945.

Q. Mr. Hodgson and Mr. Hough?

A. Both witnessed it.

Q. Witnessed the placing of the duplicate in the Mason jar? A. That is right.

Q. At what time? A. 12:55 and 12:58.

Q. 12:55 for Mr. Hodgson and 12:58 for Mr. Hough? A. Yes.

Q. I show you plaintiffs' Exhibit 13 in evidence, and ask you what you did with that instrument and the duplicate thereof, if there was a duplicate?

A. There was a duplicate.

Q. On September 6th?

A. There was a duplicate. We followed the same pro-[78] cedure. It was witnessed. The time recorded. The duplicate was put in the Mason jar and that was done at 1:00 p.m. September 6th, 1945. My signature went on, Wayne Hodgson as 1:01 p.m., and Mr. Hough at 1:03 p.m., September 6th, 1945.

Q. In other words, this shows two gentlemen witnessed the placing of the duplicate in the Mason jar?

A. That is right.

Q. I show you now Plaintiffs' Exhibit 14 in evidence and ask you what you did with that instrument and the duplicate thereof, if there was one, on September 6th, 1945?

A. That was the Northwest Quarter of Section 20.

(Testimony of Harold W. Lewis)

Q. Torrid No. 1. A. Torrid No. 1.

Q. Indicated in this position on the map?

A. I can't see it from here.

Q. Then step down.

A. It is right here. This is the one where I was overcome by the heat and I stopped probably a quarter of a mile from the placing of the instruments in the Mason jar. I signed the documents. I posted the time and I gave it to Wayne Hodgson and Mr. Fulmer and they went over and placed it in the Mason jar, a duplicate in the Mason jar.

Q. At what time?

A. That was 2:05 p.m. And they put it in the Mason [79] jar apparently at 2:16 p.m., September 6th, 1945.

Q. Did you post any further notices after that time on that date, September 6th? A. I did not.

Q. The heat got the best of you? A. Yes, sir.

Q. Now, I show you Plaintiffs' Exhibit 23 in evidence, and ask you what you did with that instrument and/or the duplicate thereof, if there was one, on September 7th, 1945?

A. On this one, on everything that was done on September 7th that I witnessed or had anything to do with, we merely witnessed the signatures, we placed the time on them, we put them in the Mason jar, because the Mason jars and the posts had already been placed the day before.

Q. In other words, you went out to the location, Torrid No. 4? A. That is right.

Q. The stake was already in the ground and the Mason jar was already in the ground?

A. That is right.

(Testimony of Harold W. Lewis)

Q. Was there a duplicate of this instrument, Plaintiffs' Exhibit 23? A. Yes, there was.

Q. There was? A. Yes, sir. [80]

Q. What did you do with it? Just place it in the jar?

A. We folded it and put it in the jar with the other one.

Q. At what time? A. 10:01 a.m.

Q. On September—

A. September 7th, 1945.

Q. Who witnessed the placing of that in the jar?

A. W. W. Bradshaw.

Q. You folded it and placed it in the jar with the other one?

A. That had been placed there the previous day.

Q. I show you Exhibit 25 in evidence and ask you what you did with that instrument and the duplicate thereof, if there was one, on September 7th, 1945?

A. There was a duplicate. At 10:05 I signed the last name. It was witnessed by Howard Hough and Wayne Hodgson.

Q. Referring now to the location known as, the claim known as Temperate No. 3?

A. Temperate No. 3. That was signed and—signed at 10:05 a.m. September 7th, 1945. The duplicate was placed in the Mason jar at the base of the stake.

Q. You placed it in each instance—in each instance you placed them in the jar? A. Yes, sir. [81]

Q. Now, I show you Plaintiffs' Exhibit 28 for identification and ask you what was done with that instrument

(Testimony of Harold W. Lewis)

and the duplicate thereof, if there was one, on September 7th, 1945?

A. Well, Mr. Bradshaw was the one who made the filing on that.

Q. Did you hand—you said there was a duplicate?

A. There was a duplicate.

Q. Did you hand the original and duplicate to Mr. Bradshaw? A. We did.

Q. On the morning of September 7th?

A. We did.

Q. And do you remember where you handed it to him?

A. We were in the car. That is all I can tell you.

Q. Was the car on the roadway that you indicated in here?

A. That is right. We used to drive back and forth to make it as short a walking distance as possible because of the heat.

Q. Did you ask him to file that claim?

A. We did.

Q. On the northwest Quarter of Section 21?

A. That is right.

Q. Known as Temperate No. 1? [82]

A. Temperate No. 1, yes, sir.

Q. Do you remember about what time you asked him to do that?

A. Well, they must have left before ten o'clock.

Q. Give us your best recollection—not what they must have done.

A. Well, I would say that they left about a quarter of ten in the morning and we all had our watches set according to Western Union time, with instructions not to file until ten o'clock.

(Testimony of Harold W. Lewis)

Q. All right. Now, what did you tell Mr. Bradshaw when you handed him that instrument and the duplicate?

A. He was to put the time on that he put the duplicate in the Mason jar.

Q. All right. Now, you will notice on this instrument the signature of W. W. Bradshaw. Are you familiar with his signature?

A. Well, I saw it down there.

Q. Can you identify that as Mr. Bradshaw's signature?
A. I would say it was.

Q. And you handed him both instruments a little prior to ten o'clock.
A. I would say yes.

Q. The instrument purports to be timed 10:42 a.m. Is that correct? [83]
A. That is correct.

Q. How long after 10:42 a.m. if at all, did you see Mr. Bradshaw again on that morning of the 7th?

A. Yes, he came back in probably an hour or thereabouts—maybe a little less time. I can't recall. I don't recall the exact time he came back.

Q. And when he came back did he hand you anything?

A. He handed us the original.

Q. Plaintiffs' Exhibit—
A. This exhibit.

Q. Plaintiffs Exhibit 28?

A. That is right. And Mr. Houck took it.

Q. Mr. Houck is one of the plaintiffs in this action?

A. That is right.

Q. And thereafter I believe you previously testified, you caused the sale to be recorded in the County Recorder's office?
A. I did.

Q. Do you know who Mr. Bradshaw was?

A. He was a high school teacher at the El Centro school. He was a football coach but I don't know what else.

[Testimony of Harold W. Lewis]

Q. In 1945?

A. In 1945. He probably taught some subject.

Q. Did you make an effort to contact Mr. Bradshaw since that time? [84]

A. Yes. I have tried to locate him on several occasions and I understand he is now living in Texas some place.

Q. You contacted the school where he was employed at that time, at the time this instrument was signed in 1945?

A. I didn't personally but I had a man go over there to try to contact him.

Q. Did you get a report?

A. I got a report from him saying that he had left. He only taught one year and had gone to Texas.

Q. Now, the only time that elapsed was approximately twenty minutes between the time you first saw Mr. Bradshaw and the time he returned with Plaintiffs' Exhibit 28, is that correct?

A. I would say approximately that, yes.

Mr. Hedges: I will offer this, if your Honor please, as Plaintiffs' Exhibit 28.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 28, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 28 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 28, W. W. Bradshaw has signed as the party posting the Notice of Location, with the hour being written in as 10:42 o'clock A. M., and there are no witnesses to said posting who have signed thereon.]

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: I show you now Plaintiffs' Exhibit No. 29 in evidence, and ask you whether or not you had a duplicate of that instrument and if so what you did with both instruments on September 7th, 1945?

A. The duplicate was placed in the Mason jar at the [85] base of the post in the Northeast Quarter of Section 20.

Q. On the claim known as—claim known as Torrid No. 2? A. Yes.

Q. By yourself?

A. By myself. And the time was 11:01 a.m.

Q. There was another claim in the jar at that time?

A. There was the claim which we had filed on the 6th in the jar at the time.

Q. Did you have anyone with you at that time?

A. No, I did not.

Q. That is the reason why there are no witnesses to the location? A. That is right.

Q. I show you now Plaintiffs' Exhibit 30 in evidence and ask you what you did with that instrument and the duplicate thereof, if there was one, on September 1945, that effects the claim known as Tropical No. 1 on the map, Plaintiffs' Exhibit 1.

A. Tropical No. 1 is right there, isn't it?

Q. That is correct.

A. That was right beside the road, within a few feet from the highway. That was the duplicate—the duplicate was put in the jar at 11:04 a.m.

Q. By yourself? [86]

A. By myself on September 7th, 1945.

(Testimony of Harold W. Lewis)

Q. Did you have any witnesses or other persons with you at that time? A. I did not.

Q. I show you Exhibit 31, Plaintiffs' Exhibit 31, in evidence, and ask you what you did with that instrument and the duplicate, if there was one, on September 7th, 1945, that affects the claim known as Frigid No. 1, indicated on the map, Plaintiffs' Exhibit 1?

A. That was placed in the Mason jar at 11:05 on September 7th—11:05 a.m., September 7th, 1945, and the witness was W. W. Bradshaw.

Q. You placed that in the jar?

A. I placed that in the jar, yes.

Q. Together—

A. With the one put in the previous day.

Q. And Mr. Bradshaw was there with you at that time? A. Yes, sir.

Q. And witnessed your placing it in the Mason jar?

A. That is correct.

Mr. Hedges: I think I am through with these claims if your Honor please. We will now go into a different line of questioning. It is 12:00 o'clock and a good time for a break.

The Court: All right, we will recess until 2:00 o'clock [87] p.m.

(Whereupon, at 12:00 o'clock noon, a recess was had until 2:00 o'clock p.m. of the same day.) [88]

Los Angeles, California, Tuesday, June 3, 1947

2:00 P. M.

The Court: You may proceed.

HAROLD W. LEWIS,

called as a witness by and on behalf of the plaintiffs, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Hedges:

Q. Mr. Lewis, did you go back on the property described in Plaintiffs' Exhibit No. 1, at any time after the 7th of September, the date of the second filing on the property?

A. I was there in the middle of October of the same year.

Q. And what did you do in the middle of October of 1945 when you went upon the property?

A. Went down to see that every notice of location was there—every notice of location was in the jar. I opened each and every jar to see that they were there.

Q. In other words, you went to the location designated on Plaintiffs' Exhibit 1, Torrid 1, Torrid 2, Torrid 3, Torrid 4; Temperate 1, Temperate 2, Temperate 3, Temperate 4; Frigid 1, Frigid 2, Frigid 3, Frigid 4; Tropical 1, Tropical 2, Tropical 3 and Tropical 4?

A. That is right. [89]

Q. And did you open the glass Mason jars in each instance at each location? A. I did.

(Testimony of Harold W. Lewis)

Q. And what did you find when you opened the glass jars?

A. Found the duplicate notices of location that had been placed there on the filings.

Q. In other words, did you find in each instance that the location notices to which we have previously referred, that is the ones placed in the jars on the 6th of September and the 7th of September, in each instance were in each of the respective jars? A. They were.

Q. Now, in the middle of October 1945 at the time to which you have referred, did you do any discovery work or any physical work upon the property at that time? A. Not at that time.

Q. When was the next time, then, after the middle of October 1945, that you went upon the property described in Plaintiffs' Exhibit 1?

A. I was down there on various occasions from then on until the latter part of November when we started the discovery work.

Q. You mean by that that you were on and off the property? [90] A. Several times.

Q. On several different occasions between October of 1945 and November of 1945? A. That is right.

Q. When did you commence the discovery work to which you have just referred?

A. The last week of November 1945.

Q. Now, will you tell us just what you did in connection with this work when you started and how many men you had with you and where you started and the work actually performed, if any?

A. We started along the highway.

(Testimony of Harold W. Lewis)

Q. Let us have a date, approximately, first.

A. That would be somewhere around the, probably the 23rd or 24th of November, 1945—right after Thanksgiving, whatever that day was, and carried on through.

Q. All right. Will you point out on the map, Plaintiffs' Exhibit 1, which location you went to first to perform your development or discovery work?

A. We had roughly the first day—I would say roughly 45 to 50 Mexicans. We took them out.

Q. Pardon me. Where did you recruit this crew from?

A. Brawley.

Q. Did you truck them out there?

A. We trucked them out there. [91]

Q. Or carry them out there?

A. We trucked them out.

Q. You provided the transportation?

A. We provided the transportation, yes.

Q. All right.

A. We started—we paced off a spot back from the jar and the stake and set a crew of men to work at one spot. We took the next group and set in here—we distributed those along the main highway to do the work that was necessary.

Q. Were those locations staked out, the ones that are described on the map now, Plaintiffs' Exhibit 1, were they staked out?

A. They were marked out with a stake—not the four corners as I remember.

Q. As Mr. Imler testified?

A. Yes.

(Testimony of Harold W. Lewis)

Q. And you started then on Temperate No. 4, is that correct?

A. I think we started on Temperate 4 and Tropical 2 at the same time, and then we took part of the crew up here.

Q. To the best of your memory now then you started on Temperate 4 and Tropical 2? A. I think so.

Q. And you say you had about 40 men?

A. That first morning we had about 40 men and then we [92] increased the crew up until one time I think we had somewhere around 65 men.

Q. Let us take Temperate No. 1 for example. Did you perform the work on that location or both of those locations, there being two locations designated on the map, by digging this so-called pit in the ground as Mr. Imler described? A. We did. We dug the hole.

Q. And how far did you dig?

A. We dug down, I think, about five feet.

Q. Now, when you say you dug, you mean these men that you had hired did the actual work. Was that by pick and shovel?

A. Pick and shovel, yes. Then we didn't come into any evidence of the mineral so we moved onto a high spot to try to discover it there, thinking we might be in a draw.

Q. You are referring to the fact that you moved from Location No. 1 to Location No. 2?

A. That is right.

Q. On Temperate No. 4, is that correct?

A. That is right.

Q. You did not discover any mineral in the first location? A. No.

(Testimony of Harold W. Lewis)

Q. You moved on to the second location. How deep did you dig that pit? [93]

A. I think we dug that approximately the same depth.

Q. Approximately five feet?

A. I would say four to five feet. I don't know what the figures show there. I can't see them.

Q. Did you have any particular reason for stopping at five feet?

A. None, other than the fact that we had dug far enough to see if there was anything there and we couldn't find it and we figured later on we might have to move to some other part of the section.

The Court: At what depth does this clay that you speak of being so valuable, usually is found?

The Witness: Some places, Judge, it is that far under the ground and some places it is quite a few feet under the ground.

The Court: Is that something like the stuff they use for building?

The Witness: No, no. This is altogether different. I have a piece of it in my pocket.

The Court: And the over-burden varies from place to place?

The Witness: Yes. There is a piece of it.

The Court: What is this used for?

The Witness: It is used as a food supplement for cattle.

The Court: In what form? Do you grind it? [94]

The Witness: It is ground and they use a small percentage with the grain feed.

(Testimony of Harold W. Lewis)

The Court: Does it have nutritional qualities? I know horses sometime take a mouthful of dirt. I didn't know they found it generally.

The Witness: From what the bio-chemists say, I don't think this develops any nutritional qualities. I think what it does is re-establish in the animal the minerals that are needed for assimilation.

The Court: To establish a balance?

The Witness: Yes, like the irons and calciums and so forth.

The Court: All right, go ahead.

Q. By Mr. Hedges: Now, did you move approximately the number of yards of dirt as testified to by Mr. Imler this morning from those two locations?

A. I think we did.

Q. That was 80 cubic yards. He testified 80 cubic yards on the No. 1 pit and 86.6 yards on the No. 2 pit.

A. In some instances those were extremely hard and others they were not.

Q. Did the men that you had working—strike that. How much did you pay these men that worked on this location? A. Day labor we paid \$1.00 per hour.

Q. \$1.00 per hour to each laborer? [95]

A. That is right.

Q. And did they perform work on the one location to which we are now referring, Temperate No. 3 or Temperate No. 4, rather, equal to the minimum amount of dollars as provided by the statute—that is, \$160.00 to each 160 acres? A. We did.

Q. Did they perform work in excess of that?

A. In excess to that, yes.

(Testimony of Harold W. Lewis)

Q. How much in excess of \$160.00 would you say?

A. Well, we tried to keep the crews, about 10 men each, because of work ability. It was easier for ten men to work in a hole than a big number and then we would work those men in that hole probably until they got down where the shoveling was too deep and we would work roughly two days.

Q. In other words, you would work until you had moved a sufficient—what you felt was a sufficient number of cubic yards of ground and until you had expended a sufficient amount of money to qualify under the statute, is that right?

A. That is right.

Q. Now, where did you dig your next pit after you left Temperate No. 4?

A. We had a crew of men right along the highway and each one of those pits we had a group of people in that were—that would have been eight—we had eight holes on which we worked on the first six, as I remember, and as we finished [96] then we moved the crews up to replace and then we moved the dirt on the top end and the dirt on the lower end locations.

Q. I believe you said that you thought you had two crews, one working on Temperate 4 and Tropical 2 at about the same time?

A. That is right.

Q. Now, on Tropical 2 did you move the quantity of material from that pit as testified to by Mr. Imler, approximately 33.7 cubic yards of material?

A. I think we did because that was—that was hard rock—rock was almost at the top of the surface and that was a complete pick and shovel job from the start to the finish.

(Testimony of Harold W. Lewis)

Q. Did you spend a sum of at least \$160.00?

A. We did.

Q. On Tropical No. 2? A. We did.

Q. Then was the claim known as Temperate No. 3 your next location as well as you can recall now?

A. Well, what we did—I don't think I made myself clear. As I say, we had 40 or 45 men and we had about four crews working at the same time, starting at this end and then crews working along as we went right along that highway.

Q. All right. Well, did you move on Temperate No. 3, there being two locations on that, the approximate number of [97] yards of material as testified to by Mr. Imler, namely, 53.0 cubic yards on the number 1 pit and 47.2 yards on the No. 2 pit? A. We did.

Q. And did you spend a sum for labor in excess of the sum of \$160.00 on that location? A. We did.

Q. And is that likewise true of Tropical No. 1 where Mr. Imler testified that 74.0 cubic yards were moved from the No. 1 pit and 47.1 cubic yards from the No. 2 pit?

A. That is correct.

Q. And did you spend a sum for labor in excess of the sum of \$160.00 on that claim? A. We did.

Q. And is the same thing true on Torrid No. 4 where Mr. Imler testified that you moved 32.5 cubic yards of material? A. We did.

Q. And did you spend a sum in excess of \$160.00 on that?

A. That was another spot that was almost solid rock.

Q. Is the same thing true of Frigid No. 2 where he testified you moved 93.7 cubic yards of material?

A. That is correct.

(Testimony of Harold W. Lewis)

Q. And did you spend the sum in excess of \$160.00 on that occasion? A. We did. [98]

Q. And is the same thing true of Torrid No. 3 where Mr. Imler testified— A. Which one is that?

Q. Torrid No. 3 is this location.

A. That is right, we did.

Q. On Plaintiffs' Exhibit 1? A. We did.

Q. Where he testified you moved 80.6 cubic yards of material? A. We did.

Q. And did you spend a sum of money in excess of \$160.00 on that location? A. Yes, sir.

Q. And is the same thing true of Frigid No. 1 on Plaintiffs' Exhibit 1 where he indicated you moved 125.5 cubic yards of material? A. We did.

Q. And is the same thing true on Torrid No. 1 up in the Northwest Quarter of Section 20, where he indicated you moved 46.0 cubic yards of material?

A. Yes. That was another spot that was very hard.

Q. And in each of these instances that I have gone over you expended in excess of \$160.00?

A. Yes, sir.

Q. In labor? [99] A. Yes, sir.

Q. And is the same thing true on Torrid No. 2 where he testified you moved 113.0 cubic yards?

A. We did.

Q. And Temperate No. 1 where he testified you moved 70.9 cubic yards? A. Yes, sir; we did.

Q. And Temperate No. 3 where he testified you moved 100 cubic yards? A. Yes, sir; we did.

Q. And in each of those instances did you spend the sum in excess of \$160.00 for each claim?

A. Yes, sir; we did.

(Testimony of Harold W. Lewis)

Q. And on Frigid No. 3, down here in the Southwest Quarter of Section 29, is it true that you moved in excess of 100 or an equal sum of 139.4 cubic yards as testified to by Mr. Imler? A. We did.

Q. And on Frigid No. 4 in the Southeast Quarter of the same section where he testified you moved 100 cubic yards, is that true? A. That is correct.

Q. And on Tropical No. 3 where Mr. Imler testified you moved 63.7 cubic yards of material, is that correct?

A. That is correct. That was another hard shot. [100]

Q. And on Tropical No. 4 Mr. Imler testified you moved 50.2 cubic yards of material. Is that correct?

A. That is correct.

Q. And in each of those instances did you spend a sum in excess of \$160.00 for each location?

A. We did.

Q. What was the total amount, if you recall, that you expended in connection with this development work on the four sections involved, 20, 21, 28 and 29?

A. A little over \$2,600.00, as I recall correctly.

Q. Does that area involve 2,560 acres?

A. It does.

Q. Now, with this total amount of money that you say you expended—I believe you said it was in excess of \$2,600.00? A. That is right.

Q. Did you build any buildings or outhouses or anything of that sort with that money?

A. No, not at all.

Q. What was the money used for in particular?

A. It was for, the great bulk of it was for the digging of the holes, the payroll.

(Testimony of Harold W. Lewis)

Q. That is labor, day labor, is that correct?

A. Day labor. I think the next largest item was the shovels and picks. [101]

Q. Which you purchased for the labor?

A. We had to furnish for the labor.

The Court: You confined yourselves to doing the minimum work necessary?

The Witness: Yes, sir.

The Court: You were not trying to exploit the property?

The Witness: Not then, no, sir.

Q. By Mr. Hedges: You stated sometime ago, I believe, that you were on this property in 1942?

A. That is right.

Q. Did you personally at that time do any digging on the property?

A. No, I didn't do any digging. I picked up some samples. And brought them in and had them analyzed.

Q. Where did you pick the samples up from? I mean, from this land described in Plaintiffs' Exhibit 1?

A. Yes.

Q. Some material that you picked up from the ground or was there a hole in the ground?

A. There was a side cliff.

Q. An open face cliff? A. Open face cliff, yes.

Q. And did that material contain the Montmorillonite clay that we have referred to in the stipulation on the property? [102]

A. According to the analysis by Smith-Emory.

Mr. Hedges: While counsel are examining the books, if you don't mind, I will proceed with some photographs I have here.

(Testimony of Harold W. Lewis)

Mr. Wood: May I see these first?

Mr. Hedges: Surely.

Q. By Mr. Hedges: I show you, Mr. Lewis, a photograph and ask you if you have ever seen that before?

A. Yes, I have.

Q. And I notice on the back of the photograph it is marked "Southwest Quarter of Section 21." Is that in your handwriting? A. It is.

Q. Southwest Quarter of 21 is the location marked Temperate No. 3? A. That is right.

Q. Is that correct? A. That is right.

Q. I will ask you whether or not that photograph—strike that. Is that your picture in the photograph?

A. It is.

Q. I will ask you whether or not that is a picture, is a true representation of the pit dug at that location on the Southwest Quarter of 21, being the location known as Temperate No. 3, and which one of the two locations is on [103] Plaintiffs' Exhibit 1 that represents?

A. That was the one closest to the road.

Q. The one nearest to the highway? A. Yes.

Q. That is marked No. 2 on Plaintiffs' Exhibit 1?

A. Yes.

Mr. Hedges: We offer that in evidence as Plaintiffs' next exhibit in order.

The Court: All right.

The Clerk: Plaintiffs' Exhibit 38 in evidence.

(The document referred to was marked as Plaintiffs' Exhibit 38, and was received in evidence.)

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: I show you a photograph on the reverse side of which appears the wording, "Southwest Quarter of Section 20." Is that in your handwriting?

A. It is.

Q. And have you ever seen that picture before?

A. I have.

Q. And does that represent the location on the Southwest Quarter of Section 20 which is Torrid No. 3?

A. That is right.

Q. Is that a true representation of the pit dug at that location?

A. That is the corner of the pit.

Mr. Hedges: I offer that as Plaintiffs' next in order. [104]

The Court: It is admitted.

The Clerk: Plaintiffs' Exhibit 39 in evidence.

(The document referred to was marked as Plaintiffs' Exhibit 39, and was received in evidence.)

Q. By Mr. Hedges: I show you a photograph on the reverse side of which appears the wording, "Northwest Quarter of Section 20." A. Northeast.

Q. Northeast Quarter, I beg your pardon, of Section 28, which is Tropical No. 2. Is that correct?

A. Yes, sir.

Q. On Plaintiffs' Exhibit 1? A. Yes, sir.

Q. That was written, the wording was written on the back in your handwriting? A. That is right.

Q. Is that your picture? A. That is.

Q. In the center of the pit? A. That is right.

Q. And I will ask you whether or not that picture is a true representation of that location? A. It is.

Mr. Hedges: Offer that as Plaintiffs' next in order.

(Testimony of Harold W. Lewis)

The Court: It will be received. [105]

The Clerk: Plaintiffs' Exhibit 40 in evidence.

(The document referred to was marked as Plaintiffs' Exhibit 40, and was received in evidence.)

Q. By Mr. Hedges: I show you a photograph on the reverse side of which is written, "Northwest Quarter of Section 28," which is Tropical No. 1.

A. That is right.

Q. And ask you is that wording in your handwriting?

A. It is.

Q. Is that your picture? A. Yes, sir.

Q. In the photograph? A. Yes, sir.

Q. And which one of the two locations on that section does that represent?

A. We had a picture taken in each one and I don't know which one it was because one was no good.

Q. Can you tell whether this is the one, from that picture, whether this is the one closest to the highway or the one furthest away?

A. I think the one furthest away.

Q. That is the one marked No. 2 on the map?

A. I think it is.

Q. That was the second location that was dug, and is that correct? [106] A. Yes, sir.

Q. And is that a true representation of the pit on that location? A. It is.

Mr. Hedges: I offer that as Plaintiffs' next in order.

The Court: When were the photographs taken?

The Witness: They were taken between four or five weeks ago.

(Testimony of Harold W. Lewis)

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 41 in evidence.

(The document referred to was marked as Plaintiffs' Exhibit 41 and was received in evidence.)

Mr. Hedges: Your Honor will notice from the pictures the sand has blown back into the pit.

The Court: Yes.

Q. By Mr. Hedges: I show you a photograph on the reverse side of which appears the wording "North-east Quarter of Section 29," which is marked "Frigid No. 2," on Plaintiffs' Exhibit 1, and ask you did you write that location on the back of the photograph?

A. I did.

Q. It is in your handwriting? A. Yes, sir.

Q. That is your picture in the center of the pit?

A. That is right. [107]

Q. Is that a correct representation of the pit on that location? A. It is.

Mr. Hedges: I offer that as Plaintiffs' next in order.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 42 in evidence.

(The document referred to was marked as Plaintiffs' Exhibit 42, and was received in evidence.)

Q. By Mr. Hedges: I show you a photograph on the back of which is marked "Postmark and bottle containing location notices" and ask you whether or not that is a true representation of the stake to which you referred this morning and the bottle in which you placed these location notices on each of the claims marked on Plaintiffs' Exhibit 1?

(Testimony of Harold W. Lewis)

A. That is right. And I tried to get it—to take the picture of the stake so it would show the writing but I couldn't do it. It was too bright.

Q. That is a correct representation of the manner in which you located the stake and bottle on each of the locations?

A. With the exception I had the bottle in the ground. We took it out there to take the picture because the bottle wouldn't show in the ground.

Mr. Hedges: I ask that be received as plaintiffs' next in order. [108]

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 43 in evidence.

(The document referred to was marked as Plaintiffs' Exhibit 43 and was received in evidence.)

Q. By Mr. Hedges: I show you a photograph on the reverse side of which is marked "Southwest Quarter of Section 20," being the location Torrid No. 3?

A. That is right.

Q. On the map, Plaintiffs' Exhibit 1?

A. That is right. I took three pictures there and put them together to get three different views of the surrounding hills and deposits.

Q. Do each of the three pictures show a true representation of that one location? A. They do.

Mr. Hedges: We offer the three together then in evidence as Plaintiffs' next in order.

The Court: They will be received.

The Clerk: Plaintiffs' Exhibit 44 in evidence.

(The documents referred to were marked as Plaintiffs' Exhibit 44, and were received in evidence.)

(Testimony of Harold W. Lewis)

Q. By Mr. Hedges: Now, I show you what appears to be a timebook which is marked on the face of the cover "Workmen's Standard Timebook," containing a number of pages, some of which are blank, and some of which contain writing, and ask [109] you if you have ever seen that before? A. I have.

Q. When did you first see it?

A. The day the Mexican foreman made up the list of names.

Q. Did you purchase the book? A. I did.

Q. And that is your handwriting in the book?

A. No. There is some up here—that is, but the names are not mine.

Q. Referring to the top portion of the book?

A. That was put on there—

Q. Just a minute. Did you give the book to anyone?

A. None other than the foreman who carried it to make the payroll.

Q. That is what I am getting at. Did you purchase the book and did you give it to the foreman after you purchased it? A. I did.

Q. What was the foreman's name?

A. I had two foremen. As a matter of fact, I had three foremen. I had two Mexican foremen and one was named Trinidad Roso and the other was Camillio, and I had Wayne Hodgson, too, when we had a crew of white boys.

Q. Did more than one foreman have the book at any one [110] time? A. No.

Q. Do you remember who you gave it to first?

A. Lawrence Camillio.

(Testimony of Harold W. Lewis)

Q. And did you give them any instructions when you handed him or them the book?

A. We hired our crew and as we hired them we put their names down. I couldn't speak Spanish and they couldn't speak English, so he took their names and wrote them down.

Q. You mean the page to which you are referring now, which is the second page in the book containing the list of names which appear to be all Mexican, or of Mexican descent, at least, were written in by the foreman, is that right?

A. That is correct.

Q. Under your direct supervision?

A. I stood right there and watched him.

Q. And is that true in each instance where a name appears in the book?

A. That is true in all the Mexican names excepting when we got over here to the white boys who were high school boys. I wrote that.

Q. Now, you are referring to page 5 of the book?

A. That is right.

Q. The names appearing on that page are in your handwriting? [111]

A. I printed them in but the figures of the time Wayne Hodgson put in.

Q. That was one of your foremen to whom you referred?

A. That is right.

Q. Were those figures and the amounts that appear on the right-hand margin put in there under your direction and supervision?

A. That is right.

Q. And at your request?

A. At my request, yes.

(Testimony of Harold W. Lewis)

Q. Now, I notice there are some names over to the rear of the book.

A. On the last page there is a list of names. Those were surplus names that we would use in the event we needed them.

Q. Just a minute. You are referring now to the next to the last page of the book and the names appearing on that sheet. Those men performed no work?

A. Unless some of these few we will have to check the names to see if they were in the payroll.

Q. But there are no hours after it? A. No.

Q. Nor any amount of money? A. No.

Q. Now, on the third page— [112]

A. From the back?

Q. From the back there appears a group of five names.

A. That is right.

Q. Do you know in whose handwriting those names are?

A. That was in the other foreman's. His name was Roso.

Q. He is the third foreman that you referred to?

A. He is the third foreman.

Q. Were those names put in there under your direct supervision? A. I saw him put those in.

Q. You saw him write them? A. Yes, sir.

Q. Now, do the hours that appear after each man's name in each instance represent the number of hours that he worked on these locations set forth in Plaintiffs' Exhibit 1? A. Yes.

Q. And does the amount of money set forth after each name represent the amount that he was paid?

A. It does, the total.

(Testimony of Harold W. Lewis)

Q. Who made payment to each of these men and how was it made?

A. I went to the Bank of America, main office in Los Angeles, and purchased a cashier's check. I took it to the Bank of America office at Brawley where, with the assistance of the manager and the money teller, I guess you would call him, they made up the various amounts of money needed. We put them in envelopes and paid the individual men.

Q. Let us not go too fast here. Did you take these men down to the bank?

A. We took them to the bank or they met us at the bank on the last day.

Q. Each one of the men's names that are set forth in this book were taken or appeared at the bank?

A. Appeared at the bank.

Q. Bank of America at Brawley, is that correct?

A. That is right.

Q. Were they paid the amounts that are set forth after their respective names?

A. They were, less the deductions that had been advanced where we gave them a dollar or fifty cents or something.

Q. Do you know the name of the teller of the bank?

A. Mr. Eddy.

Q. And the name of the manager there?

A. Mr. Farie.

Q. And were you present at the bank at the time this amount of money was paid to these parties named in here?

A. I was.

Mr. Hedges: We offer this in evidence as Plaintiffs' [114] next in order.

(Testimony of Harold W. Lewis)

The Court: It will be received.

The Clerk: Plaintiffs' Exhibit 45 in evidence.

(The timebook referred to was marked as Plaintiffs' Exhibit 45 and was received in evidence.)

Q. By Mr. Hedges: I show you what appears to be a statement to Eugene H. Imler, addressed to Mr. H. W. Lewis, Minerals Industries Corporation, and ask you if you have seen that before? A. Yes.

Q. Was that submitted to you—strike that. Do you know what those services were for for which the bill shows a total of \$62.00?

A. It was for his crew who met us on the morning of the 6th of September to make—

Q. 1945?

A. 1945. To make corner locations and to set stakes for the posting of the property together with the work done by his man, Hodgson, on the day of the 7th, plus his—

Q. You have a notation on there, "Paid two seven four six by company check." Is that your handwriting?

A. That is my handwriting.

Q. Now, was this \$62.00 that you paid to Mr. Imler for his services in surveying the land? That is not this survey, is it? [115] A. No, sir.

Q. That is the one made in 1945?

A. Yes, the one made in 1945.

Q. Is that part of the sum of some \$2,600 odd dollars you said you expended?

A. That was put in there, yes, sir.

Q. And in addition to the sums of labor which we have just gone over and this sum of \$62.00, you said that you

(Testimony of Harold W. Lewis)

spent some other monies for picks and shovels. Do you recall how much was spent in that connection?

A. We spent considerably over \$100.00, if I recall. We had about 50 shovels and we had about 25 picks, and they cost somewhere in the neighborhood of \$2.00 apiece.

Q. I believe you said you purchased some tape. By that I assume you mean steel tape for measuring?

A. That is right.

Q. Do you recall what you expended for that?

A. I think it was \$5.00. It was standard steel tape.

Q. Did you charge any gasoline and oil for transportation around the property to this \$2,600?

A. The only gas and oil was charged in the two trucks, gasoline and oil to haul the men back and forth from Brawley.

Q. Do you recall how much was spent in that connection? A. A little over \$80.00.

Q. Was there any other money spent in that connection? [116]

A. Well, water containers and things of that nature.

Q. You had to purchase water containers—that is to carry water? A. For the men.

Q. For the workmen, is that correct?

A. The men. It was terribly hot.

Q. In mid-September?

A. Yes—no, that was in December.

Q. November and December, but still it was awfully hot to work? A. Yes.

Q. Do you recall how much you expended for water containers?

A. Well, they would steal them just about as fast as I could take them out there. I bought a lot of them. I

(Testimony of Harold W. Lewis)

don't know how many. I would say \$15.00 or \$20.00 worth.

Q. Those are the only items that you have included in the total sum of \$2,600 that you spent in connection with the development of the property?

A. That is correct.

Q. Previously I questioned you on Plaintiffs' Exhibit 4 for identification, which is the so called substituted power of attorney that you gave to W. W. Bradshaw on September 6th, 1945. I believe you testified that you had a sunstroke just about—prior to the time that you made this out? [117]

A. Two o'clock roughly.

Q. And you were unable to continue your activities on the property?

A. That is right.

Q. Was that the reason you appointed under your power of attorney Mr. Bradshaw?

A. That is right.

Mr. Hedges: We will offer this Plaintiffs' Exhibit 4 for identification in evidence.

The Court: It may be received.

(The document referred to was marked as Plaintiffs' Exhibit 4, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 4 is similar to Exhibit No. 2 on page 76 except that on the second page of Exhibit No. 4 is written the following:

“September 6, 1945

I hereby delegate, substitute and appoint W. W. Bradshaw for me and in my name, place and stead to exercise and perform all of the powers conferred upon me by the foregoing instrument.

(Signed) H. W. Lewis

In the Presence of

(Signed) Stanley B. Houck.”]

(Testimony of Harold W. Lewis)

Mr. Hedges: You may cross examine, gentlemen.

Cross-Examination

By Mr. Painter:

Q. Mr. Lewis, this rate of \$1.00 per hour, was that the going rate for day laborers in this locality at that time?

A. I think that was quite a low rate for labor to get to go onto the desert.

Q. According to your best knowledge what would you say was the going rate for this particular type of work? Do you understand it was more than a dollar an hour?

A. I didn't hear the first part of your question.

Q. Is it your statement that the going rate for laborers, day laborers for this type of work was more than \$1.00 per [118] hour at that time?

A. I don't think so. I think that day labor was available at around \$1.00 an hour if you could get it.

Q. And that was the general going rate in the locality? A. I think so.

Q. In this booklet which has been marked as Plaintiffs' Exhibit No. 4, does this booklet contain the full and complete figures on the monies which were paid to the Mexican laborers in the latter part of November or the early part of December for what we will call the "discovery work" done at that time and which you have testified to?

A. That was the payrolls that were paid for the digging of the holes.

(Testimony of Harold W. Lewis)

Q. Now, did you issue a check to the Bank of America and did then the Bank of America issue the cash to you with which to pay the men?

A. I bought a cashier's check.

Q. You bought a cashier's check? A. Yes, sir.

Q. Do you have the receipts for your cashier's check yet?

A. I think that the Bank of America at Brawley can identify that it was cashed there.

Q. In other words, you cashed all of these cashier's checks or whatever cashier's checks you had at the Bank of [119] America in Brawley, is that correct?

A. That is right.

Q. And was it all done on one day?

A. No. Part of the payroll—for instance, the boys, the high school boys I paid them at at an entirely different time than I paid the other men.

Q. Well, did you pay the high school boys by the same method? A. Cash.

Q. By cash? A. Yes.

Q. And does the amount of money which you paid to the high school boys in cash appear in that book as a separate and distinct item from the amount you paid to the Mexican laborers? A. Yes.

Q. And that amount is \$256.50, is that correct?

A. Correct.

Mr. Painter: That is all.

The Court: Any other questions?

Mr. Wood: I would like to ask a few questions.

Q. By Mr. Wood: Mr. Lewis, referring to the claim marked Torrid No. 4, on which Plaintiffs' Exhibit No. 1 shows two holes here, were you down there at the time they were digging those holes? A. Yes. [120]

(Testimony of Harold W. Lewis)

Mr. Hedges: Pardon me. You said "Torrid No. 4." There is only one hole on that.

Mr. Wood: Temperate, I meant, pardon me. I am sorry. Temperate No. 4 showing two holes.

Q. By Mr. Wood: Were you there when both those holes were dug? A. Yes, sir.

Q. You are positive of that? A. I think so.

Q. And were you present when both of the holes were dug that are shown on Temperate No. 3? A. Yes.

Q. You are just as positive of that as the other testimony you have given here today? A. I am.

Q. Now, these Mexicans that you were using, who hired them for you?

A. Lawrence Camillio. And later on, Trinidad Roso.

Q. Do you know whether or not they had work permits to work in the United States?

Mr. Hedges: That is objected to as wholly immaterial. It has no bearing on the issues in this case.

The Court: I do not see the materiality of that. Half of the Mexicans living in the Imperial Valley are illegally in the country. [121]

Mr. Wood: I agree with your Honor on that.

The Court: If you ever took them out of there you would start a revolution.

Mr. Wood: I agree with you, your Honor.

The Court: We deal with that problem when holding court in San Diego. I don't think it is material. The objection is sustained.

Mr. Wood: I think that is all.

The Court: Any redirect examination?

Mr. Hedges: No, your Honor.

The Court: Step down. Call your next witness.

Mr. Hedges: Call Mr. Howard Hough.

HOWARD HOUGH,

called as a witness by and on behalf of the plaintiffs' having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Howard Hough.

Direct Examination

By Mr. Hedges:

Q. Where do you reside, Mr. Hough?

A. Imperial.

Q. Is that the proper pronounciation of your name?

A. Yes.

Q. You live in Imperial? [122] A. Yes, sir.

Q. Do you have a box number or street address?

A. Box 621.

Q. Now, were you retained by anyone to go upon the property described in Plaintiffs' Exhibit 1 on or about September 6th of 1945? A. That is right.

Q. And by whom were you asked to go upon the property? A. Mr. Lewis and Mr. Houck.

Q. I show you Plaintiffs' Exhibit 5 for identification, which is an acceptance of stipulations, reservations, and power of attorney, and call your attention to the handwritten portion of the document on the bottom of page 2, which says, "I hereby delegate, substitute and appoint Howard H. Hough for me and in my name, place and stead, to execute, perform all the powers conferred upon me by the foregoing instrument dated September 6th, 1945," and signed "H. W. Lewis," and ask you if you have seen that instrument before? A. Yes, sir.

Q. And when did you see it?

A. September 6th, 1945.

(Testimony of Howard Hough)

Q. Was it handed to you by someone?

A. By Mr. Lewis himself.

Q. Was that after Mr. Lewis had had his sunstroke that he previously testified to? [123]

A. That is right.

Q. On September 6th? A. Yes, sir.

Mr. Hedges: We at this time, if your Honor please, offer Plaintiffs' Exhibit 5 for identification in evidence.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 5, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 5 is similar to Exhibit No. 2 on page 76 except that on the second page of Exhibit No. 5 is written the following:

"I hereby delegate, substitute and appoint Howard W. Hough for me and in my name, place and stead to exercise and perform all of the powers conferred upon me by the foregoing instrument.

September 6, 1945.

(Signed) H. W. Lewis

In the Presence of

(Signed) W. W. Bradshaw

(Signed) V. G. Fulmer"]

Q. By Mr. Hedges: I show you Plaintiffs' Exhibit 15 for identification, being a location notice and dated September 6th, 1945, purporting to bear the signatures of yourself at the bottom of the location, and I will ask you to inspect that document and tell me whether or not those are your signatures at the bottom of the page?

A. That is right.

(Testimony of Howard Hough)

Q. Appearing as attorney in fact for the plaintiffs that are named in this lawsuit, is that correct?

A. That is correct.

Mr. Hedges: We offer this Plaintiffs' Exhibit 15 in evidence.

Mr. Painter: May we have the same objection as heretofore made to any and all claims or, rather, notices of location which bear the date of September 6th, without repeating that objection?

The Court: All right. [124]

Mr. Painter: Insofar as this witness is concerned.

The Court: All right.

The Clerk: Plaintiffs' Exhibit 15 in evidence.

(The document referred to was marked as Plaintiffs' Exhibit 15, and was received in evidence.)

Q. By Mr. Hedges: I show you Plaintiffs' Exhibit 16 for identification, being a notice of location dated September 6th, 1945, on the bottom of which appears in several places the signature H. W. Hough, and ask you whether or not those are your signatures?

A. No, no, it is H. H. Hough.

Q. Are those your signatures on the bottom of that page? A. That is right.

Q. And the date of September 6th, 1945 appears thereon? A. That is correct.

Mr. Hedges: We offer this as Plaintiffs' next in order in evidence as Exhibit 16.

The Court: It may be received.

(The document referred to was marked as Plaintiffs' Exhibit 16, and was received in evidence.)

(Testimony of Howard Hough)

Q. By Mr. Hedges: I show you Plaintiffs' Exhibit 17 for identification, dated September 6th, 1945, and call your attention to the signature H. H. Hough appearing at the bottom of that document, and ask you whether or not the [125] signature that appears thereon is your signature—are they your signatures? A. They are.

Q. That is dated September 6th, 1945?

A. Correct.

Mr. Hedges: I offer that as Plaintiffs' Exhibit 17 in evidence.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 17, and was received in evidence.)

Q. By Mr. Hedges: I show you Plaintiffs' Exhibit 18 for identification, dated September 6th, 1945, and call your attention to the bottom of the page where there appears the signatures of H. H. Hough, and ask you whether or not those are your signatures? A. They are.

Q. And the date of September 6th, 1945?

A. Correct.

Mr. Hedges: I offer that as Plaintiffs' Exhibit 18 in evidence.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 18, and was received in evidence.)

Q. By Mr. Hedges: I show you Plaintiffs' Exhibit 19 for identification, dated September 6th, 1945, and I

(Testimony of Howard Hough)

call your [126] attention to the signatures appearing at the bottom of the page, the signatures H. H. Hough, and ask you whether or not those are your signatures?

A. That is correct.

Mr. Hedges: I offer this instrument as Plaintiffs' Exhibit 19.

The Court: It may be received.

(The document referred to was marked as Plaintiffs' Exhibit 19, and was received in evidence.)

Q. By Mr. Hedges: I show you Plaintiffs' Exhibit 20 for identification, dated September 6th, 1945. I call your attention to the signatures, H. H. Hough, appearing at the bottom thereof, and ask you whether or not those are your signatures? A. That is correct.

Mr. Hedges: I offer this as Plaintiffs' Exhibit 20 in evidence.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 20, and was received in evidence.)

Q. By Mr. Hedges: I show you Plaintiffs' Exhibit 21 for identification, dated September 6th, 1945. I call your attention to the signatures appearing at the bottom of the page and ask you whether or not those are your signatures? A. They are. [127]

Mr. Hedges: I offer this as Plaintiffs' Exhibit 21 in evidence.

(Testimony of Howard Hough)

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 21, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibits 7-21, inclusive, are similar to Exhibit No. 6, save and except as hereinafter set forth:

(a) Each of said exhibits contains the correct time of filing, correct claim name and legal description of the claim involved and the respective book and page in which each of said claims was recorded in the office of the County Recorder of Imperial County;

(b) Plaintiffs' Exhibit 14 contains the signatures of V. G. Fulmer and Wayne H. Hodgson as witnesses;

(c) Plaintiffs' Exhibits 15, 16, 17, 18 and 20 are signed by H. W. Lewis as the party who executed the Notice of Location for the respective locators; a line has been drawn through said signature, and the signature of H. H. Hough appears in lieu thereof; that J. R. Burns and M. J. Koppel signed as witnesses and lines have been drawn through said signatures;

(d) Plaintiffs' Exhibits 19 and 21 have the same deletions and additions as appear in Exhibits 15, 16, 17, 18 and 20, except that there are no witnesses's signatures on said claims.]

Q. By Mr. Hedges: Now, on September 6th, 1945, at the instance of Mr. Lewis, did you file the claim—that is, the duplicate of the claim marked Exhibit 15 which you identified here, on a location known as Temperate No.

(Testimony of Howard Hough)

1? That is the Northwest Quarter of Section 21, appearing here on Plaintiffs' Exhibit 1?

A. Northwest Quarter?

Q. Northwest Quarter? Isn't that what it says there?

A. That is right, that is correct; yes, sir.

Q. Now, was anyone with you at the time you filed this location notice? A. I believe there was.

Q. I call your attention to the fact that there were some signatures at the bottom under the heading, "Witness" which were crossed off.

A. As I recall, there was one other man with me at this time.

Q. Well, he did not sign as a witness, however, on the location notice, did he? A. It appears not. [128]

Q. All right. Now, do you have a duplicate of this?

A. Yes, sir.

Q. Notice, Plaintiffs' Exhibit 15? A. Yes, sir.

Q. And what did you do with that notice?

A. It was signed and placed in the fruit jar near the sign describing it, this above property, Northwest Quarter of Section 21.

Q. At or about the time that is designated on Plaintiffs' Exhibit 15, which is 5:00 p.m.? A. Yes, sir.

Q. Did you mark that time on there?

A. Yes, sir.

Mr. Painter: Mr. Hedges, we can barely hear the witness over here.

Q. By Mr. Hedges: Speak up a little louder.

I show you Plaintiffs' Exhibit 16, which is a location notice on the Southeast Quarter of Section 28, and ask

(Testimony of Howard Hough)

you if you had a duplicate of that location notice on the 6th of September?

A. Yes, sir; there was a duplicate filed.

Q. What did you do with the duplicate of that location notice?

A. The duplicate was signed and dated and placed in the fruit jar near the sign. [129]

Q. At or about the time that is designated on Plaintiffs' Exhibit 16, which is 5:20 p.m., September 6th, 1945?

A. That is right.

Q. Is that the time—did you put that time in there?

A. Yes, sir.

Q. I show you Plaintiffs' Exhibit 17, which is a location notice on the Northeast Quarter of Section 20, designated as Torrid No. 2, and ask you if you had a duplicate of that notice on September 6th, 1945?

A. Yes, sir; there was a duplicate also of this one which was placed in the fruit jar near the sign marking this quarter section and also dated as to time, 5:26 p.m.

Q. 5:26 p.m. on September 6th, 1945 are figures and letters that you wrote?

A. Yes, sir.

Q. On Plaintiffs' Exhibit 17?

A. Yes, sir.

Q. I show you Plaintiffs' Exhibit 18 which is a location notice on the Southwest Quarter of Section 28, the claim known as Tropical No. 3, and ask you if you had a duplicate of that notice on September 6th, 1945?

A. Yes, sir.

Q. What did you do with the duplicate of that notice?

A. The duplicate was placed in a fruit jar with my [130] signature and the date and 5:50 p.m.

(Testimony of Howard Hough)

Q. 5:50 p.m., September 6th, 1945 appears in your handwriting on Plaintiffs' Exhibit 18?

A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. I show you Plaintiffs' Exhibit 19, which is a location notice affecting the Southeast Quarter of Section 29, being known as Frigid No. 4, and ask you if you had a duplicate of that notice on September 6th, 1945?

A. Yes, sir.

Q. And did you do substantially the same thing with that notice as you previously testified? A. I did.

Q. Did you place that duplicate notice in the fruit jar at or about the time that appears on Plaintiffs' Exhibit 19, which is 5:50 p.m., September 6th, 1945?

A. I did.

Q. Was that in your handwriting?

A. Yes, sir, that is my handwriting.

Q. I show you Plaintiffs' Exhibit 20, which is a location notice affecting the Northeast Quarter of Section 21, known as Temperate No. 4, and ask you if you had a duplicate of that notice? A. Yes, sir. [131]

Q. Did you do substantially the same thing as previously testified to with the duplicate? A. I did.

Q. And did you place it in the fruit jar at that location at or about the time Plaintiffs' Exhibit 20 bears, which is 6:05 p.m., September 6th, 1945?

A. I did.

Q. And those figures and letters are in your handwriting? A. They are.

Q. I show you Plaintiffs' Exhibit 21, which is a location notice affecting the Southwest Quarter of Section

(Testimony of Howard Hough)

29, known as Frigid No. 3, and ask you whether or not you had a duplicate of that notice on September 6th, 1945?

A. Yes, sir.

Q. And did you place that duplicate in the fruit jar on that location at or about the time as is set forth on Plaintiffs' Exhibit 21, which is 6:45 p.m., September 6th, 1945?

A. Yes, sir.

Q. And those letters and figures are in your handwriting?

A. They are.

Q. I show you Plaintiffs' Exhibit 6, which is a location notice affecting the Northeast Quarter of Section 28, on [132] the claim known as Tropical No. 2. I call your attention to the signature at the bottom under the heading "Witnesses" of Howard H. Hough, September 6th, 1945, 12:11 p.m. Is that your signature?

A. Yes, that is.

Q. Was that placed upon Plaintiffs' Exhibit 6 at the date it bears and at the time?

A. Yes, sir.

Q. And you witnessed the filing of this particular claim, Plaintiffs' Exhibit 6?

A. I did.

Q. And Mr. Hodgson was with you at that time?

A. That is right.

Q. And did he sign this in your presence?

A. Yes, sir.

Q. On that date?

A. Yes, sir.

Q. I show you Plaintiffs' Exhibit 7, which is a location notice affecting the Southeast Quarter of Section 21, dated September 6th, 1945. I call your attention to the signature "Howard H. Hough," September 6th, 1945, 12:18 p.m., and ask you if that is your signature?

A. That is.

(Testimony of Howard Hough)

Q. And did you sign it on the date that the instrument bears, September 6th, 1945? [133] A. I did.

Q. And did you sign it at approximately 12:18 p.m. as therein indicated? A. Yes, sir.

Q. And was Mr. Hodgson present at the time that you signed the instrument? A. He was.

Q. He signed in your presence? A. Yes, sir.

Q. I call your attention to Plaintiffs' Exhibit 8, which is a location notice affecting the Northwest Quarter of Section 28, known as Tropical No. 1, dated September 6th, 1945, and call your attention to the signature "Howard H. Hough, September 6th, 1945, 12:32 p.m." appearing at the bottom thereof, and ask you whether or not that is your signature? A. That is my signature.

Q. And did you sign it on the date that the instrument bears, September 6th, 1945? A. I did.

Q. At or about the time as is stated therein?

A. Yes, sir.

Q. And was Mr. Hodgson present at that time?

A. He was.

Q. And did he sign the instrument in your presence? [134] A. He did.

Q. I show you Plaintiffs' Exhibit 9, which is a location notice on the Northeast Quarter of Section 29, being claim known as Frigid No. 2, dated September 6th, 1945. I call your attention to the signature "Howard H. Hough" appearing at the bottom of the instrument—"Howard H. Hough, September 6th, 1945, 12:38 p.m." and ask you if that is your signature? A. That is.

Q. And did you sign the instrument on the date that it bears, September 6th, 1945, at or about the time that appears thereon? A. I did.

(Testimony of Howard Hough)

Q. And was Mr. Hodgson with you at that time?

A. He was.

Q. Did he sign in your presence? A. He did.

Q. I show you Plaintiffs' Exhibit 10, being a location notice affecting the Southeast Quarter of Section 20 on a claim known as Torrid No. 4, dated September 6th, 1945. I call your attention to the signature appearing at the bottom of the page, "Howard H. Hough, September 6th, 1945, 12:44 p.m." and ask you if that is your signature? A. That is.

Q. And you signed it on the date the instrument bears, [135] September 6th, 1945, at or about the hour therein set forth? A. I did.

Q. And was Mr. Hodgson present at that time?

A. He was.

Q. And did he sign in your presence?

A. Yes, sir; he did.

Q. I call your attention to Plaintiffs' Exhibit 11, which is a location notice affecting the Southwest Quarter of Section 21, on a claim known as Temperate No. 3, dated September 6th, 1945, and call your attention to the signature appearing at the bottom thereof, "Howard H. Hough, September 6th, 1945, 12:46 p.m.," and ask you whether or not that is your signature? A. It is.

Q. Was it signed on the date the instrument bears, September 6th, 1945, at the hour of 12:46 p.m.?

A. Yes, sir.

Q. And Mr. Hodgson was present at the time?

A. That is right.

Q. Signed it in your presence?

A. That is right.

(Testimony of Howard Hough)

Q. I call your attention to Plaintiffs' Exhibit 12, which is a location notice affecting the Southwest Quarter of Section 20, representing a claim known as Torrid No. 3, and dated September 8th, 1945. I call your attention to the signa-[136] ture "Howard H. Hough" appearing at the bottom of the page, September 6th, 1945, 12:58 p.m., and ask you if that is your signature? A. It is.

Q. And did you sign the instrument at the date and time therein indicated? A. Yes, sir.

Q. Was Mr. Hodgson present with you at that time?

A. He was.

Q. And did he sign the instrument in your presence?

A. Yes, sir.

Q. I call your attention to Plaintiffs' Exhibit 13, which is a location notice affecting the Northwest Quarter of Section 29, representing the claim known as Frigid No. 1, dated September 6th, 1945, and call your attention to the signature appearing at the bottom of the page, "H. H. Hough, September 6th, 1945, 1:03 p.m.," and ask you if that is your signature? A. Yes, sir.

Q. And did you sign it on the date and at the time therein indicated? A. I did.

Q. Was Mr. Hodgson present at that time?

A. He was

Q. Did he sign in your presence? [137]

A. Yes, sir.

Q. I show you an instrument—I show you Plaintiffs' Exhibit 14, which is a location notice affecting the Northwest Quarter of Section 20, on a claim known as Torrid No. 1, dated September 6th, 1945—strike that.

This is one that you didn't have anything to do with.

(Testimony of Howard Hough)

Now, in each instance on the claims that you located—strike that

In each instance where you witnessed the signature of the locator as you have testified, did you actually see the duplicate notice placed in the Mason jar on the particular property? A. Yes, sir.

The Court: You merely went along as a witness, isn't that true?

The Witness: And also to help locate the corners.

The Court: Locate the corners?

The Witness: Yes, sir.

The Court: You have no interest in the claims?

The Witness: No interest whatsoever.

The Court: Were you paid for your services?

The Witness: Yes, sir.

The Court: What is your occupation?

The Witness: Surveyor. [138]

The Court: You are a surveyor?

The Witness: Yes, sir.

The Court: Licensed in California?

The Witness: No, I am not a licensed surveyor.

The Court: You are not licensed?

The Witness: No.

Mr. Hedges: No further questions, your Honor. You may cross examine.

The Court: Any questions, gentlemen?

Mr. Painter: May I speak to counsel for just a moment?

The Court: All right.

Mr. Painter: Your Honor, there is one exhibit, Exhibit No. 25, in which it appears that this witness witnessed a posting of a notice. The Court: Yes.

(Testimony of Howard Hough)

Mr. Painter: And counsel did not ask him anything about that on direct examination. It is not exactly proper cross examination but I understand this witness would like to get back to Brawley.

The Court: All right.

Mr. Painter: And I wondered if it would be asking too much if I might question him about his signature on that one out of order?

The Court: Yes.

Mr. Painter: Other than that I have no cross examination. [139]

The Court: Gentlemen, you want to be careful in a case like this. There are so many exhibits and you must be careful about returning them to the clerk.

Mr. Hedges: You are right. I have lost some already.

The Court: Each time you leave the courtroom return them to the clerk, otherwise we will have to hunt for our exhibits.

Mr. Hedges: That was strictly an oversight on my part. Do you mind if I finish?

Mr. Painter: He is going to finish with it so it will not be necessary for me to cross examine him on that.

Mr. Hedges: It is one I overlooked, your Honor.

The Court: All right.

Q. By Mr. Hedges: I show you, Mr. Hough, Plaintiffs' Exhibit 5, which is a location notice affecting the Southwest Quarter of Section 21, the claim known as Temperate No. 3, dated September 7th, 1945. I call your attention to the signature appearing under the heading

(Testimony of Howard Hough)

"Witnesses," Howard H. Hough. Is that your signature?

A. It looks like it, but I very seldom make my H's that way. Sometimes I do.

Q. You cannot say whether it is or it isn't your signature?

A. I believe it is because this is the way I make R's constantly, but I very seldom make H's that way, but I would [140] say that that is my signature, but I would also say it is not the same pen. It doesn't look like the same pen but I believe that is my signature.

Mr. Hedges: No further questions.

The Court: All right.

Mr. Painter: No cross examination.

Mr. Wood: No examination.

The Court: Step down. I think we will take a short recess before you call your next witness.

(Short recess.)

The Court: All right, gentlemen.

Mr. Hedges: If your Honor please, we have been discussing with counsel, and if it is satisfactory with the court we would appreciate it if we could adjourn today at four o'clock.

The Court: I can't approve of that, gentlemen. As you know, I was away and this case had to be re-set and I have so much work to do before I go into the criminal department and then I have to go back to Fresno the last of this month and we must use all available time. I will, however, to help you all I can adjourn today at 4:30.

Mr. Hedges: That is perfectly satisfactory.

The Court: I know you have offices but I have work to do also. There is just so much work and I have to do it.

Mr. Hedges: It doesn't make any difference to me. I [141] was only trying to accommodate counsel.

The Court: I appreciate that. Maybe in a day or so we will shorten the hours if I see we will finish the case. You may proceed.

Mr. Hedges: Mr. Hough came up to me after we had excused him as a witness and wanted to correct a statement that he made. May I recall him?

The Court: I am always glad for a witness to make a correction.

HOWARD H. HOUGH,

called as a witness by and on behalf of the plaintiffs, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination (Resumed)

By Mr. Hedges:

Q. Mr. Hough, I previously examined you with reference to Plaintiffs' Exhibit No. 25, which is the notice of location affecting the Southwest Quarter of Section 21, and known as claim Temperate No. 3, dated September 7th, 1945. I asked you whether or not the signature "Howard H. Hough" appearing under the heading "Witnesses" at the bottom of the page was your signature.

You had some question about it but finally said you thought that it was. Now, you have come to me during the recess and stated that you don't believe that is your signature. [142]

A. Yes, that is the conclusion I came to and I will tell you why. When you first called it to my attention I

(Testimony of Howard Hough)

looked over here on the board and noticed that this particular hole is on the road and I know that I was all along that part there so evidently I missed the date.

Q. I believe you told me you were not out on the property on the 7th—only on the 6th?

A. Only on the 6th.

Q. And you want your testimony corrected accordingly? A. Yes, sir.

Q. Very well, that is all.

The Court: Call your next witness.

Mr. Hedges: Call Mr. Marion H. Eddy.

MARION H. EDDY,

called as a witness by and on behalf of the plaintiffs' having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Marion H. Eddy.

Direct Examination

By Mr. Hedges:

Q. What is your address, Mr. Eddy?

A. Brawley, California, Postoffice Box 1460.

Q. And what is your business, profession, or occupation? [143] A. Banker.

Q. And by whom are you employed?

A. Bank of America.

Q. What branch?

A. Brawley branch, Brawley, California.

Q. Have you been sitting in the courtroom all during the morning session and the afternoon session up to now?

A. Yes, sir.

(Testimony of Marion H. Eddy)

Q. And you listened to the testimony of Mr. H. W. Lewis? A. Yes, sir.

Q. That he had either brought personally or mailed to your bank in Brawley a cashier's check for \$2,500?

A. That is right.

Q. Do you recall approximately the time that you received that cashier's check?

A. No, I couldn't say the approximate time of the day.

Q. I don't want you to be that accurate.

A. You mean the date?

Q. The date, approximate date.

A. I would say it was the 6th of December, or possibly the 5th. I am pretty sure it was the 6th of December, 1945.

Q. December 1945? A. Yes, sir.

Q. Around the early part of December 1945? [144]

A. Yes, sir.

Q. What did you do with the cashier's check that was handed to you? Was it handed to you or was it sent through the mails?

A. No, the check was apparently brought into the bank by Mr. Lewis and presented to our manager, Mr. Fabbri, and he okayed the cashier's check for payment and then he brought Mr. Lewis and introduced him to me, and I made the arrangements for cashing the check into the denominations that were necessary to meet his payroll.

Q. I show you Plaintiffs' Exhibit 45 and ask you if you have ever seen that book before. Examine it, please, before you answer.

A. Well, I couldn't definitely say I have seen it before or not. I know he had a list of names and the amounts that we used in order to make our breakdown on the de-

(Testimony of Marion H. Eddy)

nominations of the money that was used to cash the cashier's check.

Q. You don't recall whether the denominations came from that book or not?

A. I don't know whether it was this or a list separate.

Q. I show you two slips of paper clipped together. One appears to be an adding machine tape slip and the other a currency count slip on yellow paper, on the back of a Bank of America saving deposit slip. Can you identify that?

A. Yes, I recognize my figures on here. [145]

Q. Is that in your handwriting, the figures that appear thereon? A. Yes.

Q. Is that the way you broke down the denominations of the money? A. Yes, sir.

Q. And the total appearing thereon is \$2,500?

A. \$2,500, yes.

Q. And that amount represents the amount of the check you received from Mr. Lewis, the cashier's check?

A. That is right.

Mr. Hedges: I ask that be marked as Plaintiffs' next in order.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 46 in evidence.

(The document referred to was marked as Plaintiffs' Exhibit 46, and was received in evidence.)

Q. By Mr. Hedges: Now, you took the \$2,500 and broke it down into the various cash denominations that the laborers could be paid with, is that correct?

A. Yes, that is right.

(Testimony of Marion H. Eddy)

Q. Did Mr. Lewis bring these laborers into the bank?

A. Yes. We gave him the use of our directors' room and lobby to take care of his payroll.

Q. Did he bring them all in at the one time or did he [146] bring them in in groups?

A. No, he brought them in in groups of about eight Mexicans at a time.

Q. What did you do with the money?

A. The money was tured over to Mr. Lewis so he could make up his payroll in advance of bringing the Mexicans in.

Q. In other words, you handed Mr. Lewis the money while he was in the bank, in the directors' room, is that it?

A. Yes, sir.

Q. And did you in turn see him hand the money to these laborers?

A. I didn't see all the groups but as I remember I saw approximately two groups go through there of eight and the whole process took considerable time, although I was busy. I realized even though I was busy that it took quite a considerable length of time and I did see two groups go through of approximately eight people.

Mr. Hedges: You may cross examine, gentlemen.

Mr. Painter: No cross examination.

Mr. Wood: No examination.

The Court: I think these witnesses who are from a distance should be informed that they are not needed any longer. I am sure the witness who just left the witness stand wants to go back to his bank so it will be understood all these witnesses are excused unless for some reason you gentlemen detain them yourselves. [147]

Mr. Hedges: That may be understood.

Mr. Painter: Yes.

The Court: All right, call your next witness.

Mr. Hedges: Mr. Fabbri.

EUGENE J. FABBRI,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Eugene J. Fabbri.

Direct Examination

By Mr. Hedges:

Q. Your full first name? A. Eugene.

Q. Where do you reside, Mr. Fabbri?

A. I live in Brawley, California.

Q. What is your business, profession or occupation?

A. Manager of the Bank of America at Brawley, California.

The Court: What did you do? Close the bank?

The Witness: Just about, Judge.

Mr. Hedges: He says it is not too hot down there yet.

Q. By Mr. Hedges: You have been sitting in the courtroom during the morning session and the afternoon session, have you not? [148] A. Yes, sir.

Q. And have heard the testimony of Mr. H. W. Lewis that he sent a \$2,500 cashier's check down to your bank?

A. Yes, sir; I would say that he brought it down personally.

Q. Brought it down? A. That is right.

(Testimony of Eugene J. Fabbri)

Q. Was it handed to you or to Mr. Eddy?

A. It was handed to me, scrutinized, identified, approved and then turned over to Mr. Eddy for encashment.

Q. And were you in the bank in the early part of December? I believe Mr. Eddy said to the best of his recollection it was about the 4th or 5th of December, 1945?

A. Yes, sir. My records indicate it was on the 6th of December, 1945.

Q. 6th of December? A. Yes, sir.

Q. All right. And were you present when Mr. Eddy broke this cash down into the various smaller denominations?

A. I was not present when he broke it down. However, I identified the list of amounts that were to be broken down.

Q. I call your attention to Plaintiffs' Exhibit 45 and ask you if you ever saw this book before?

A. No, I did not personally see this book, as far as the timebook was concerned, although Mr. Lewis did have with [149] him either the book or the equivalent setting forth the names and amounts of the various persons that were to be paid.

Q. I see. And did you instruct Mr. Eddy to break that down into the proper denominations?

A. That is right, I did.

Q. And were you present while Mr. Lewis brought these men into the bank for payment?

A. Yes. As I recollect it from my vantage point, from my desk, I saw several groups come in and in fact I

(Testimony of Eugene J. Fabbri)

personally went over to find out if Mr. Lewis was getting along all right with the Mexicans. They do not speak the American language very well and oftentimes interpretation does help.

Q. You helped interpret?

A. Well, a word here and there, helped out, yes.

Mr. Hedges: I believe that is all.

Mr. Painter: No cross examination.

Mr. Wood: No cross examination.

The Court: Call your next witness.

Mr. Hedges: Mr. Hodgson.

WAYNE HODGSON,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name. [150]

The Witness: Wayne Hodgson.

Direct Examination

By Mr. Hedges:

Q. Where do you reside, Mr. Hodgson?

A. Apartment 32, Imperial Hotel, Imperial, California.

Q. And what is your business, profession, or occupation? A. Surveyor.

Q. And was that your occupation on the 6th of September, 1945? A. That is correct.

(Testimony of Wayne Hodgson)

Q. Were your services retained on or about the 6th of September, 1945 to go upon the property set forth in the map on the board, Plaintiffs' Exhibit 1?

A. Well, I was working for Mr. Imler and Mr. Hough, more or less, and I went with Mr. Hough but under the direction of Mr. Imler at the time though. Whether or not Mr. Imler knew about this job at the time I don't know, but I went with Mr. Hough.

Q. You were asked, however, to be a witness to some of these locations and in some instances were the actual locator, is that true? A. Yes.

Q. I show you Plaintiffs' Exhibit 3 for identification, a document entitled "Acceptance of Stipulations, Reservations, [151] and Power of Attorney," and call your attention to the bottom of the page of the instrument where in handwriting appears the words, "I hereby delegate, substitute and appoint Wayne Hodgson for me and in my name, place and stead, to execute and perform all of the powers conferred upon me in the foregoing instrument," dated September 6th, 1945, and signed H. W. Lewis, and ask you if you have seen that document before?

A. Yes.

Q. And was that handed to you by Mr. Lewis at or about the date it bears?

A. It was either handed to me by Mr. Lewis or Mr. Houck. I rather believe it was Mr. Houck that handed it to me because Mr. Lewis was indisposed at that time.

Q. That was after he suffered a sunstroke, is that correct? A. Yes, sir.

(Testimony of Wayne Hodgson)

Mr. Hedges: We offer this in evidence as Plaintiffs' Exhibit 3.

The Court: It may be received.

(The document referred to was marked as Plaintiffs' Exhibit 3, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 3 is similar to Exhibit No. 2 on page 76 except that on the second page of Exhibit No. 3 is written the following:

"I hereby delegate, substitute and appoint Wayne H. Hodgson for me and in my name, place and stead to exercise and perform all of the powers conferred upon me by the foregoing instrument.

September 6, 1945.

(Signed) H. W. Lewis

In the Presence of

(Signed) W. W. Bradshaw

(Signed) V. G. Fulmer"]

Q. By Mr. Hedges: I show you now Plaintiffs' Exhibit 6, which is a location notice affecting the Northeast Quarter of Section 28, and the claim entitled Tropical No. 2. [152] I call your attention to the signature appearing at the bottom of the page under the heading, "Witnesses," Wayne H. Hodgson, September 6th, 1945, 12:13 p.m., and ask you if that is your signature? A. Yes.

Q. And did you sign that instrument at or about the time that it bears and the hour? A. Yes.

Q. I show you Plaintiffs' Exhibit 7, which is a location notice affecting the Southeast Quarter of Section 21, being a claim known as Temperate No. 4, dated Septem-

(Testimony of Wayne Hodgson)

ber 6th, 1945, as was the previous exhibit I showed you, and call your attention to the signature appearing at the bottom of the page under the heading "Witnesses"; Wayne H. Hodgson, September 6th, 1945, 12:18 p.m., and ask you whether or not that is your signature?

A. It is.

Q. And you signed it on the date that it bears, September 6th, 1945, and at the hour indicated?

A. That is correct.

Q. Now, Mr. Hough was present with you at that time?

A. Yes.

Q. And was he likewise with you on September 6th, on the filing of the claim on Tropical No. 2, Plaintiffs' Exhibit 6? [153]

A. Yes.

Q. I call your attention to Plaintiffs' Exhibit 8, being a location notice on the Northwest Quarter of Section 28, a claim known as Tropical No. 1, and call your attention to the signature appearing at the bottom of the page under the heading "Witnesses, Wayne H. Hodgson, September 6th, 1945, 12:30 p.m.," and ask you whether or not that is your signature?

A. It is.

Q. And you signed it on the date that it bears and at about the same hour?

A. That is correct.

Q. And was Mr. Hough present with you at that time?

A. Yes.

Q. And signed in your presence?

A. Yes.

Q. I call your attention to Plaintiffs' Exhibit 9, being a location notice on the Northeast Quarter of Section 29 on the claim known as Frigid No. 2, dated September 6th, 1945, and call your attention to the signatures appearing under the heading "Witness" at the bottom of the page,

(Testimony of Wayne Hodgson)

"Wayne H. Hodgson, September 6th, 1945, 12:38 p.m.," and ask you whether or not that is your signature?

A. Yes.

Q. And did you sign that document on September 6th, [154] 1945 or at about the hour it bears? A. Yes.

Q. And was Mr. Hough present with you at that time? A. Yes.

Q. And signed in your presence? A. Yes.

Q. I call your attention to Plaintiffs' Exhibit 10, being a location notice on the Southeast Quarter of Section 20, the claim being known as Torrid No. 4, dated September 6th, 1945, and call your attention to the signature Wayne H. Hodgson appearing at the bottom of the page under the heading "Witness," and dated September 6th, 1945, 12:43 p.m., and ask you whether or not that is your signature? A. It is.

Q. And did you sign your name to this document on September 6th, 1945, at or about the hour therein indicated? A. I did.

Q. And was Mr. Hough present with you at that time? A. He was.

Q. And did he sign the document in your presence?

A. He did.

Q. I call your attention to Plaintiffs' Exhibit 11, which is a location notice on the Southwest Quarter of Section 21, the claim known as Temperate No. 3, dated September 6th, 1945, and call your attention to the signature [155] appearing at the bottom of the page under the heading "Witnesses," Wayne H. Hodgson, September 6th, 1945, 12:46 p.m., and ask you whether or not that is your signature? A. It is.

Q. And did you sign it on September 6th, 1945 at or about the hour therein indicated? A. I did.

(Testimony of Wayne Hodgson)

Q. And was Mr. Hough present with you at that time? A. He was.

Q. And did he sign in your presence?

A. He did.

Q. I call your attention to Plaintiffs' Exhibit No. 12, being a location notice on the Southwest Quarter of Section 20, on a claim known as Torrid No. 3, dated September 6th, 1945, and call your attention to the signature under the heading, "Witnesses," at the bottom of the page, "Wayne H. Hodgson, September 6th, 1945, 12:55 p.m.," and ask you whether or not that is your signature?

A. It is.

Q. And did you sign the instrument on September 6th, 1945, at or about the hour therein indicated?

A. I did.

Q. And was Mr. Hough with you at that time?

A. He was.

Q. Did he sign in your presence? [156]

A. Yes, sir.

Q. I show you Plaintiffs' Exhibit 13, being a location notice on the Northwest Quarter of Section 29 on a claim known as Frigid No. 1, dated September 6th, 1945. I call your attention to the signature appearing at the bottom of the page under the heading "Witnesses: Wayne H. Hodgson, September 6th, 1945, 1:01 p.m.," and ask you if that is your signature? A. It is.

Q. And did you sign it on September 6th, 1945 at or about the time therein indicated? A. I did.

Q. And was Mr. Howard H. Hough with you at that time? A. He was.

Q. And did he sign in your presence?

A. He did.

(Testimony of Wayne Hodgson)

Q. I call your attention to Plaintiffs' Exhibit 14, being a location notice on the Northwest Quarter of Section 20, the claim known as Torrid No. 1, dated September 6th, 1945, and call your attention to the signature appearing at the bottom of the page thereof, under the heading "Witnesses: Wayne H. Hodgson, September 6th, 1945, 2:16 p.m.," and ask you whether or not that is your signature? A. It is.

Q. And did you sign it on September 6th, 1945 at or [157] about the time and hour therein indicated?

A. I did.

Q. Was Mr. V. G. Fulmer with you at that time?

A. Yes.

Q. Did he sign the instrument in your presence?

A. He did.

Q. On each of these occasions on which I have just interrogated you did you see a duplicate copy or a duplicate original of each of these instruments placed in a glass jar on the location? A. Yes, sir.

Q. I call your attention to Plaintiffs' Exhibit 22, for identification, being a notice of location on the Southeast Quarter of Section 21, the claim known as Temperate No. 4, dated September 7th, 1945, and ask you whether or not the signatures appearing at the bottom of the page under the heading "Locaters" are your signatures? A. They are.

Q. And is the date thereon, September 7th, 1945, in your handwriting? A. Yes.

(Testimony of Wayne Hodgson)

Q. And the figures 10:00 o'clock a.m.? A. Yes.

Q. And was Mr. Fulmer with you at that time?

A. Yes. [158]

Q. Did he witness your signature? A. Yes.

Mr. Hedges: I offer this in evidence as Plaintiffs' Exhibit 22.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 22, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 22 is similar to Exhibit No. 23, save and except as herein-after set forth:

In Exhibit 22, Wayne H. Hodgson has signed as the party who posted for the locators, and V. G. Fulmer signed as the witness for the posting of said Notice at 10:00 A. M.]

Q. By Mr. Hedges: I call your attention to Plaintiffs' Exhibit 24 for identification, being a location notice on the Northeast Quarter of Section 28 on a claim known as Tropical No. 2, dated September 7th, 1945. I call your attention to the signature "Wayne H. Hodgson" under the heading "Locaters" and ask you whether or not the signatures thereon are yours? A. They are.

Q. And is the date September 7th, 1945 in your handwriting? A. It is.

Q. And is the time, 10:05 a.m., in your handwriting?

A. Yes.

(Testimony of Wayne Hodgson)

Q. And was Mr. Fulmer with you at that time as a witness? A. Yes.

Mr. Hedges: I offer this as Plaintiffs' Exhibit 24.

The Court: It will be received. [159]

(The document referred to was marked as Plaintiffs' Exhibit 24, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 24 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 24, Wayne H. Hodgson has signed as the party who posted for the locators, with the date and hour being written in as September 7, 1945, 10:05 o'clock A. M., and V. G. Fulmer has signed as the witness to the posting, with the hour being written in as 10:05 o'clock A. M.]

Q. By Mr. Hedges: I call your attention to Plaintiffs' Exhibit 26 for identification, being a notice of location on the Southwest Quarter of Section 28, on a claim known as Tropical No. 3, dated September 7th, 1945, and call your attention to the signatures appearing under the heading, "Locaters," "Wayne H. Hodgson," and ask you whether or not those are your signatures?

A. They are.

Q. And is the date September 7th, 1945, 10:30 a.m.—the time 10:30 a.m. in your own handwriting?

A. It is.

Q. And was Mr. Fulmer with you at the time that you signed this instrument? A. Yes.

(Testimony of Wayne Hodgson)

Mr. Hedges: I offer this in evidence as Plaintiffs' Exhibit 26, your Honor.

The Court: It may be received.

(The document referred to was marked as Plaintiffs' Exhibit 26, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 26 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 26, Wayne H. Hodgson has signed as the party posting the Notice of Location, with the date and hour being written in as September 7, 1945, 10:30 o'clock A. M., and V. G. Fulmer has signed as the party who witnessed the posting of the Notice, with the date and hour being written in as September 7, 1945, 10:30 o'clock A. M.]

Q. By Mr. Hedges: I call your attention to Plaintiffs' Exhibit 27 for identification, being a notice of location on the Southeast Quarter of Section 29, the claim being known as Frigid No. 4, dated September 7th, 1945, and call your attention particularly to the signatures "Wayne H. Hodgson" at the bottom of the page under the heading "Locaters," and ask you whether or not those are your signatures? A. They are mine.

Q. And is the date September 7th, 1945 and the time, 10:32 a.m., in your handwriting? A. Yes.

Q. And was Mr. Fulmer present with you at that time? A. Yes.

(Testimony of Wayne Hodgson)

Mr. Hedges: I offer this as Plaintiffs' Exhibit 27, your Honor.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 27, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 27 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 27, Wayne H. Hodgson has signed as the party posting the Notice of Location, with the date and hour being written in as September 7, 1945, 10:32 o'clock A. M., and V. G. Fulmer has signed as the party who witnessed the posting of the Notice, with the date and hour being written in as September 7, 1945, 10:32 o'clock A. M.]

Q. By Mr. Hedges: I call your attention to Plaintiffs' Exhibit 32 for identification, being a location notice on the Southeast Quarter of Section 28 on a claim known as Tropical No. 4, dated September 7th, 1945, and particularly call your attention to the signatures "Wayne H. Hodgson" appearing under the heading "Locaters" at the bottom of the page and ask you whether or not those are your signatures? A. They are.

Q. And is the date thereon, September 7th, 1945, and the time, 11:25 a.m., in your handwriting?

A. It is. [161]

Q. And was Mr. Fulmer present with you on this occasion? A. Yes.

Q. As a witness? A. Yes.

(Testimony of Wayne Hodgson)

Mr. Hedges: Offer this as Plaintiffs' Exhibit 32 if your Honor please.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 32, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 32 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 32, H. W. Lewis has signed as the party posting the Notice of Location; his signature is scratched out, and Wayne H. Hodgson has signed as the party posting the Notice of Location, with the date and hour being written in as September 7, 1945, 11:25 o'clock A. M., and V. G. Fulmer has signed as the party who witnessed the posting of the Notice of Location, with the date and hour being written in as September 7, 1945, 11:25 o'clock A. M.]

Q. By Mr. Hedges: I call your attention to Plaintiffs' Exhibit 33 for identification, being a location notice on the Northeast Quarter of Section 21, on the claim known as Temperate No. 2, dated September 7th, 1945, and call your attention particularly to the signatures "Wayne H. Hodgson" appearing under the heading "Locaters" at the bottom of the page, and ask you whether or not those are your signatures? A. They are.

Q. And in your own handwriting? A. Yes.

Q. The date September 7th, 1945, and the time, 11:40 a.m., is that in your handwriting? A. Yes.

Q. And was Mr. Fulmer with you on this occasion and at that location? [162] A. Yes.

(Testimony of Wayne Hodgson)

Mr. Hedges: I offer this in evidence, if your Honor please, as Plaintiffs' Exhibit 33.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 33, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 33 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 33, Wayne H. Hodgson has signed as the party posting the Notice of Location, with the date and hour being written in as September 7, 1945, 11:40 o'clock A. M., and V. G. Fulmer has signed as the party who witnessed the posting of the Notice, with the date and hour being written in as September 7, 1945, at 11:40.]

Q. By Mr. Hedges: I call your attention to Plaintiffs' Exhibit 34, for identification, being a notice of location on the Southwest Quarter of Section 20, the claim known as Torrid No. 3, dated September 7th, 1945. I call your attention particularly to the signatures appearing at the bottom of the page under the heading "Locaters," "Wayne H. Hodgson," and ask you whether or not those are your signatures? A. They are.

Q. And is the date, September 7th, 1945, and the time, 12:25 p.m., in your own handwriting? A. Yes.

Q. And was Mr. V. G. Fulmer and Mr. W. W. Bradshaw present with you at the time you filed this claim?

A. Yes.

Q. And they signed the claim as witnesses?

A. That is correct.

(Testimony of Wayne Hodgson)

Mr. Hedges: I offer this in evidence, if the court please.

The Court: It may be received. [163]

The Clerk: Plaintiffs' Exhibit 34 in evidence.

(The document referred to was marked as Plaintiffs' Exhibit 34, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 34 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 34, Wayne H. Hodgson has signed as the party posting the Notice of Location, with the date and hour being written in as September 7, 1945, 12:25 o'clock P. M., and V. G. Fulmer and W. W. Bradshaw have signed as the parties who witnessed the posting of the Notice, with the date and hour being written in as September 7, 1945, at 12:25 P. M.]

Q. By Mr. Hedges: I call your attention to Plaintiffs' Exhibit 35 for identification, being a notice of location on the Northwest Quarter of Section 29, on a claim known as Frigid No. 4, dated September 7th, 1945, and your attention is particularly directed to the signatures at the bottom of the page under the heading "Locaters: Wayne H. Hodgson," and ask you whether or not those signatures are your signatures? A. They are.

Q. And I call your attention to the date, September 7th, 1945, and the time, 12:30 p.m. I have been corrected. This is Frigid No. 1. Are those dates and that time in your own handwriting? A. Yes.

Q. And was Mr. W. W. Bradshaw and Mr. V. G. Fulmer present with you at the time you located this claim? A. Yes.

(Testimony of Wayne Hodgson)

Q. And they so witnessed the instrument?

A. Yes.

Mr. Hedges: I offer this in evidence, if your Honor please.

The Court: It will be received.

The Clerk: Plaintiffs' Exhibit 35 in evidence. [164]

(The document referred to was marked as Plaintiffs' Exhibit 35, and was received in evidence.)

[Clerk's Note: Counsel stipulate Exhibit No. 35 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 35, H. W. Lewis has signed as the party posting the Notice of Location; his signature is scratched out, and Wayne H. Hodgson has signed as the party posting the Notice of Location, with the date and hour being written in as September 7, 1945, 12:30 o'clock P. M., and W. W. Bradshaw and V. G. Fulmer have signed as the parties who witnessed the posting of the Notice, with the hour being written in as 12:30 o'clock P. M.]

Q. By Mr. Hedges: I call your attention to Plaintiffs' Exhibit 37—strike that. I call your attention to Plaintiffs' Exhibit 36 for identification, being a notice of location on the Northwest Quarter of Section 20, on a claim known as Torrid No. 1, dated September 7th, 1945, and particularly call your attention to the signatures appearing at the bottom of the page under the heading, "Locaters: Wayne H. Hodgson," and ask you whether or not those signatures are your signatures?

A. They are.

(Testimony of Wayne Hodgson)

Q. And the date September 7th, 1945 and the time 1:15 p.m., are those in your handwriting? A. Yes.

Q. And was Mr. W. W. Bradshaw and Mr. V. G. Fulmer present with you at the time you located this claim? A. Yes.

Q. Did they sign the instrument in your presence?

A. Yes.

Mr. Hedges: I offer this, if your Honor please, as Plaintiffs' Exhibit 36.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 36, and was received in evidence.) [165]

[Clerk's Note: Counsel stipulate Exhibit No. 36 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 36, Wayne H. Hodgson has signed as the party posting the Notice of Location, with the date and hour being written in as September 7, 1945, 1:15 o'clock P. M., and W. W. Bradshaw and V. G. Fulmer have signed as the parties who witnessed the posting of the Notice, with the date and hour being written in as September 7, 1945, at 1:15 o'clock P. M.]

Q. By Mr. Hedges: I call your attention to Plaintiffs' Exhibit 37 for identification, being a location notice on the Southwest Quarter of Section 29 on a claim known as Frigid No. 3, dated September 7th, 1945, and particularly call your attention to the signatures appearing at the bottom of the page under the heading, "Locaters: Wayne H. Hodgson," and ask you whether or not those are your signatures? A. They are.

(Testimony of Wayne Hodgson)

Q. Now, I notice on this instrument a date in handwriting, September 12th, 1945, where the instruments on each and every other occasion show September 7th. Is that your handwriting, "September 12th"?

A. Yes, that is an error there.

Q. You mean that should have been September 7th?

A. Yes.

Q. And was Mr. Bradshaw present as a witness to the locating of this claim by yourself on September 7th?

A. Yes, sir.

Q. Did he so sign the instrument as a witness?

A. Yes.

Mr. Hedges: I offer this in evidence as Plaintiffs' Exhibit 37.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 37, and was received in evidence.) [166]

[Clerk's Note: Counsel stipulate Exhibit No. 37 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 37, Wayne H. Hodgson has signed as the party posting the Notice of Location, with the date being written in as September 7, 1945, and W. W. Bradshaw has signed as the party who witnessed the posting of the Notice, with the date being written in as September 7, 1945.

Each of said Notices of Location contain the date of the filing, correct legal description, and the book and page in which the claim was recorded in the Office of the County Recorder of Imperial County, California, and a statement of assessment work done, as in Exhibit 23.]

(Testimony of Wayne Hodgson)

Q. By Mr. Hedges: I call your attention, Mr. Hodgson, to Plaintiffs' Exhibit 25, which is a location notice on the Southwest Quarter of Section 21, on a claim known as Temperate No. 3, dated September 7th, 1945, which apparently—strike that. Which bears a signature "Wayne H. Hodgson," and ask you whether or not that is your signature? A. Yes, that is my signature.

Q. You were a witness at that time, at the time Mr. Lewis filed a claim on Temperate No. 3, is that correct?

A. That is correct.

Q. Now, will you tell the court, starting with Plaintiffs' Exhibit No. 37, just what you did when you went out on the Southwest Quarter of Section 29, to file this claim?

A. Point that out on the map, will you, please?

Q. Yes, Frigid No. 3.

A. Well, this is on the morning of the 7th?

Q. Correct.

A. I believe we drove that morning in a command car to a designated spot that we had located the day before. We stopped at the quarter corner of Section 29, Southwest Quarter corner of Section 29. We made sure that we were in the right quarter section. We drove a stake approximately four inches wide and four inches long with the legal description of the quarter section. [167]

Q. I am referring now to the 7th, just to refresh your memory. A. Oh, I am sorry.

Q. This is the 7th of September. Were you also out there on the 6th?

A. Yes. We did all that beforehand on the 6th, I am sorry. We had already located the corner and we put a duplicate copy of this into the pint Mason jar that was already placed there.

(Testimony of Wayne Hodgson)

Q. Now, I notice on this instrument a date in handwriting, September 12th, 1945, where the instruments on each and every other occasion show September 7th. Is that your handwriting, "September 12th"?

A. Yes, that is an error there.

Q. You mean that should have been September 7th?

A. Yes.

Q. And was Mr. Bradshaw present as a witness to the locating of this claim by yourself on September 7th?

A. Yes, sir.

Q. Did he so sign the instrument as a witness?

A. Yes.

Mr. Hedges: I offer this in evidence as Plaintiffs' Exhibit 37.

The Court: It will be received.

(The document referred to was marked as Plaintiffs' Exhibit 37, and was received in evidence.) [166]

[Clerk's Note: Counsel stipulate Exhibit No. 37 is similar to Exhibit No. 23, save and except as hereinafter set forth:

In Exhibit 37, Wayne H. Hodgson has signed as the party posting the Notice of Location, with the date being written in as September 7, 1945, and W. W. Bradshaw has signed as the party who witnessed the posting of the Notice, with the date being written in as September 7, 1945.

Each of said Notices of Location contain the date of the filing, correct legal description, and the book and page in which the claim was recorded in the Office of the County Recorder of Imperial County, California, and a statement of assessment work done, as in Exhibit 23.]

(Testimony of Wayne Hodgson)

Q. By Mr. Hedges: I call your attention, Mr. Hodgson, to Plaintiffs' Exhibit 25, which is a location notice on the Southwest Quarter of Section 21, on a claim known as Temperate No. 3, dated September 7th, 1945, which apparently—strike that. Which bears a signature "Wayne H. Hodgson," and ask you whether or not that is your signature? A. Yes, that is my signature.

Q. You were a witness at that time, at the time Mr. Lewis filed a claim on Temperate No. 3, is that correct?

A. That is correct.

Q. Now, will you tell the court, starting with Plaintiffs' Exhibit No. 37, just what you did when you went out on the Southwest Quarter of Section 29, to file this claim?

A. Point that out on the map, will you, please?

Q. Yes, Frigid No. 3.

A. Well, this is on the morning of the 7th?

Q. Correct.

A. I believe we drove that morning in a command car to a designated spot that we had located the day before. We stopped at the quarter corner of Section 29, Southwest Quarter corner of Section 29. We made sure that we were in the right quarter section. We drove a stake approximately four inches wide and four inches long with the legal description of the quarter section. [167]

Q. I am referring now to the 7th, just to refresh your memory. A. Oh, I am sorry.

Q. This is the 7th of September. Were you also out there on the 6th?

A. Yes. We did all that beforehand on the 6th, I am sorry. We had already located the corner and we put a duplicate copy of this into the pint Mason jar that was already placed there.

(Testimony of Wayne Hodgson)

The Court: You did that as to each of the locations to which you have testified?

The Witness: Yes, sir.

The Court: The same procedure?

The Witness: Yes, sir.

The Court: In other words, you found the corner and looked for the jar and put in a duplicate notice of location?

The Witness: Yes, sir.

Q. By Mr. Hedges: That is true on each of the claims that you—strike that.

The Court: I think you had better give him a list of them. I tried to cover it by one question, but I don't remember the numbers.

Mr. Hedges: All right.

Q. By Mr. Hedges: Now, on September 6th, 1945, you witnessed the notice of locations, Plaintiffs' Exhibit 6, where [168] Mr. Lewis filed the claim, is that right? That is on Tropical No. 2 which is located here on Plaintiffs' Exhibit 1. A. That is correct.

Q. And did you see Mr. Lewis at that time—strike that. What did you see Mr. Lewis do?

A. You mean from the time he got out of the car?

Q. When he was on this location what did he do with the duplicate location notice, if he had one?

A. He folded it up and put it in a pint Mason jar that was on the property.

Q. And did you sign your name in the presence of Mr. Hough to the duplicate location notice before he put it into the jar? A. I did.

Q. You witnessed, in other words, the filing?

A. That is correct.

(Testimony of Wayne Hodgson)

Q. And is that same thing true on Temperate No. 4 which is this location on Plaintiffs' Exhibit 1?

A. Yes.

Q. And is the same thing true on Tropical No. 1, which is this location? A. Yes.

Q. On Plaintiffs' Exhibit 1? A. Yes.

Q. And is the same thing true on Frigid No. 2 which I [169] am indicating on Plaintiffs' Exhibit No. 1?

A. Yes.

Q. And is the same thing true on the claim known as Torrid No. 4 which Mr. Shirley is pointing out on Plaintiffs' Exhibit No. 1? A. Yes.

Q. And is the same thing true on Temperate No. 3, which is being pointed out on Plaintiffs' Exhibit 1?

A. Yes.

Q. And is the same thing true on Torrid No. 3 which Mr. Shirley is pointing out on Plaintiffs' Exhibit 1?

A. Yes.

Q. And is the same thing true on Frigid No. 1 which Mr. Shirley is pointing out on Plaintiffs' Exhibit 1?

A. Yes.

Q. Likewise, on Torrid No. 1, which Mr. Shirley is pointing out on Plaintiffs' Exhibit 1?

A. No, on Torrid No. 1 Mr. Lewis did not place the piece of paper in the **Mason jar**.

Q. All right. Tell us just exactly what did happen on that location.

A. Mr. Lewis at approximately, I should say 200 yards from our corner, Government corner, Mr. Lewis was overcome by the heat and he sat down in the shade of a greasewood tree and signed this document I have before me, and Mr. Fulmer [170] and myself witnessed

(Testimony of Wayne Hodgson)

it and then I proceeded to find the corner and put it into the Mason jar that we had set there.

Q. In other words, Mr. Lewis instructed you to do that and he signed the instrument and you signed as witnesses? A. That is correct.

Q. But you know of your own knowledge that the claim was filed and placed in the glass jar at that location?

A. Yes. I might add at the time Mr. Lewis filed I am positive we were on that said quarter section, on the quarter section.

Q. On Torrid No. 1? A. Torrid No. 1, yes.

Q. I was only amused at your having him sit down under a greasewood tree. I know that is not much shade.

A. Any little bit helps, boy, out there.

Q. Now, on the filings on September 7th, the following day, 1945, will you tell us what you did in connection with the duplicate location notices, if there were any, on the claim known as Temperate No. 4, which is Plaintiffs' Exhibit 22? Mr. Shirley is pointing out the location on Plaintiffs' Exhibit 1.

A. I signed my name to the duplicate of Exhibit No. 22 and Mr. Fulmer witnessed it in my presence. I folded it up and put it in a pint Mason jar we had set there the previous day. [171]

Q. All right. Now, is that the same situation—strike that. Is that the same situation, is that same situation true as to Tropical No. 2 on September 7th, 1945?

A. Yes.

Q. And is the same thing true as to Tropical No. 3 on September 7th, 1945? A. Yes.

Q. Let the record show Mr. Shirley is pointing each of these locations out on Plaintiffs' Exhibit 1. And is

(Testimony of Wayne Hodgson)

the same thing true on Frigid No. 4 on September 7th, 1945? A. Yes.

Q. And as to Tropical No. 4 on September 7th, 1945—Tropical No. 4 is here? A. Yes, that is right.

Q. And is the same thing true as to Temperate No. 2 on September 7th, 1945? A. That is correct.

Q. And as to Torrid No. 3 on September 7th, 1945? A. Yes.

Q. And as to Frigid No. 1 on September 7th, 1945? A. Yes.

Q. And as to Frigid No. 3 on September 7th, 1945? A. Yes.

Q. And as to Torrid No. 1, on September 7th, 1945? A. Yes. [172]

Q. Now, did you go back on the property described in Plaintiffs' Exhibit 1 after September 7th, 1945?

A. Yes.

Q. And do you recall just when that was?

A. No, I don't. I have been on the property several times, you might say in the capacity of seeing what was going on in the way of development and what they were doing and out of my own curiosity, but acting in an official capacity for Mr. Lewis in any way, I went back onto the property at a later date but I don't know for sure what date it was.

Q. Do you recall the month? Was it in November or December of 1945, or October?

A. Well, I believe it was closer to November.

Q. Closer to November of 1945?

A. Maybe. I think it was—I think it was a little later than that. Probably in December—No, it was in the middle of the school term.

(Testimony of Wayne Hodgson)

Q. All right. You do not recall the exact time?

A. I don't. I would have had a positive record of it—I was going to school at the time and if I recall it was on a Saturday and Sunday and it don't show in the record.

Q. Were there any other persons working on the property at the time you were there? A. Yes.

Q. And I believe you have been in the courtroom all [173] morning, haven't you, and up to now?

A. Yes, sir.

Q. And you heard, did you not, Mr. Lewis' testimony that that work was done during the month of November?

A. I believe I did, yes.

Q. Would that refresh your memory as to about the time you were on the property doing some work?

A. Yes. I will say the time I was on the property was at the same time Mr. Lewis was on doing the work, too.

Q. Now, will you tell us just what your duties, if any, consisted of on the property sometime during the month of November, 1945?

A. My duties were to dig two holes 25 by 25 by 5—that is 25 feet by 25 feet and five feet deep.

Q. Do you recall which particular locations you performed this work upon?

A. Yes, I do. It is—I can't read it from here.

Q. I will indicate and you tell me if I am wrong. Are you referring to Torrid No. 1? A. That is correct.

Q. And what is the other one? A (No answer.)

(Testimony of Wayne Hodgson)

Q. You can step down if you will where you can see them a little better.

A. I believe it was Tropical No. 2—No, no, I take [174] it back. It is Tropical No. 4.

Q. Tropical No. 4? A. Yes.

Q. And Torrid No. 1, is that right?

A. That is correct. Let me check here. Now, it was on either one side of this road, but I can't be for sure. Let me say it was either on Tropical No. 4 or on Temperate No. 2.

Q. Well, it has been sometime ago now and you have forgotten?

A. Yes. I will state definitely right now that it was on Temperate No. 2.

Q. Temperate No. 2 and Torrid No. 1?

A. Yes.

Q. At this location and at this location, indicating from Plaintiffs' Exhibit 1? A. That is right.

Q. Did you have a crew of men with you?

A. I did.

Q. And were they white or Mexicans?

A. They were white.

Q. And you say your work consisted of digging two pits, one pit on each location?

A. That is correct.

Q. And how long did you work on each of those [175] locations?

A. I worked very close to 10 hours on Saturday and 10 hours on Sunday during that month.

Q. Do I understand by that you mean you worked more than one Saturday and Sunday?

A. No; we were only out there for two days. I split the crew up into two working crews.

(Testimony of Wayne Hodgson)

Q. In other words, you worked during that month one Saturday and one Sunday 10 hours each?

A. Yes, in close succession. Probably the Sunday was following the Saturday.

Q. I show you Plaintiffs' Exhibit 40 and ask you if you have seen that book before? A. Yes.

Q. And calling your attention to the names appearing on page 5, are those the names of the men whom you employed to assist you on these two locations?

A. Yes, sir.

Q. Let us call that page No. 10. They are double pages in the book. We will call it No. 10 so there will be no confusion. And are the amounts set forth after the respective names the amounts of money—strike that. Did you pay these men for their services in connection with this work? A. Yes. [176]

Q. And where did you receive the money with which to pay them?

A. I received it from Mr. H. W. Lewis.

Q. Are the amounts set forth after each of these men's names the amount of money which each of them received for their services?

A. This amount stipulated here is for two days work.

Q. I see. A. Yes, that is correct.

Q. For the record we indicate the balance at the bottom of the line which is \$256.50, is that correct?

A. That is right, if it was added correctly.

Q. If the total is right?

A. If it is added correctly, yes.

Q. That is what appears on the book at the bottom?

A. Yes.

The Court: Did you pay yourself, too?

(Testimony of Wayne Hodgson)

The Witness: Yes, sir, I made sure of that.

Mr. Hedges: He is right at the top of the list, your Honor, No. 1.

The Court: He is at the top of the list. Were you going to high school?

The Witness: No, I was going to Junior College.

The Court: And working Saturdays and Sundays?

The Witness: Yes, I was working for Mr. Imler and what-[177] ever other kind of work came up on Saturdays and Sundays. I could usually get a job with some of the surveyors around levelling land and that is what I did.

The Court: Is the Junior College located in Brawley?

The Witness: Well, they had one in Brawley but at that time the Brawley Junior College was shut down on account of the lack of students, on account of the war. I believe it is started up now but at the time I was going to J. C. in El Centro, a very small school.

Q. By Mr. Hedges: Now, this Saturday and Sunday that you performed this work was prior in time to the first day of December, was it not, of 1945?

A. I couldn't say for sure but I believe so.

Q. All right. Now, were you on the property after the time that you performed this work which you said to the best of your recollection was sometime during the month of November 1945?

A. Will you state that question again?

Mr. Hedges: Will you read the question.

(Question read.)

A. Yes, I was.

(Testimony of Wayne Hodgson)

Q. By Mr. Hedges: How many times and what were the dates as near as you can tell, if you can remember?

A. I cannot say how many times nor exactly the dates.

Q. Well, was it during the year of 1945? [178]

A. Yes, let us say it was within a month after the first time that I had drawn on—I am speaking of the month of November.

Q. All right. And what was your purpose in going on the property at that time?

A. Then my purpose was to measure the holes and compute the amount of cubic yardage moved and getting the signatures off of the claim sheets—the witnesses and the locaters and sending them in—a list to Mr. H. W. Lewis.

Q. Did you examine each of the locations on that occasion? A. Yes.

Q. And were the location notices to which I interrogated you a few minutes ago, in each instance in the jars?

A. They had not been disturbed.

Q. Did you ever see Mr. John A. Jose on the property at any time during 1945 or the early part of 1946?

A. Yes, I did.

Q. Mr. Jose being one of the defendants in this action? A. Yes.

Q. Do you recall when that was?

A. No, I don't recall the exact date but I should say it was in the same month we are talking about here, November.

Q. You mean this was after the time that you had performed the work or during that time? [179]

A. That was after the time that I performed the work.

No. 11749
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER,
WILLIAM LANCASTER, ELLA JACKMAN,
JOHN I. JACKMAN, GEORGE T. RENAKER,
JOHN S. PATTEN, HARRIS H. HAMMON, A.
L. BERGERE, J. C. BERGERE, WILLARD
WALLACE, EDNA M. WALLACE, JAMES P.
DELANEY, MARY J. DELANEY and IRVIN
S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administrator of the Estate
of Stanley B. Houck, Deceased, RUBY E. EDLING,
WILNA M. SHEPARD, HATTIE M. HOUCK,
RUTH M. HEBBERD, MINNIE N. McKEN-
ZIE, HOWARD H. McKENZIE, VERONICA K.
GHOSTLEY and H. W. LEWIS,

Appellees.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME II

(Pages 209 to 432, Inclusive)

Upon Appeals From the District Court of the United States
for the Southern District of California
Central Division

FILED

APR 12 1943

(Testimony of Wayne Hodgson)

Q. By Mr. Hedges: How many times and what were the dates as near as you can tell, if you can remember?

A. I cannot say how many times nor exactly the dates.

Q. Well, was it during the year of 1945? [178]

A. Yes, let us say it was within a month after the first time that I had drawn on—I am speaking of the month of November.

Q. All right. And what was your purpose in going on the property at that time?

A. Then my purpose was to measure the holes and compute the amount of cubic yardage moved and getting the signatures off of the claim sheets—the witnesses and the locaters and sending them in—a list to Mr. H. W. Lewis.

Q. Did you examine each of the locations on that occasion? A. Yes.

Q. And were the location notices to which I interrogated you a few minutes ago, in each instance in the jars?

A. They had not been disturbed.

Q. Did you ever see Mr. John A. Jose on the property at any time during 1945 or the early part of 1946?

A. Yes, I did.

Q. Mr. Jose being one of the defendants in this action? A. Yes.

Q. Do you recall when that was?

A. No, I don't recall the exact date but I should say it was in the same month we are talking about here, November.

Q. You mean this was after the time that you had performed the work or during that time? [179]

A. That was after the time that I performed the work.

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Central Division

(Testimony of Wayne Hodgson)

Q. And did you have a conversation with him at that time?

A. Well, yes. To make it clear here I was sort of playing detective, you might say. Mr. Jose didn't know who I was and I had been spying on Mr. Jose from an airplane and it is rather funny now to think of it. I walked up and I asked him what he was doing, and I knew very well what he was doing, and he told that he was doing assessment work and at that time he began to run down Mr. Lewis, whom I knew very well at the time, and he said some very uncomplimentary things in Mr. Lewis' direction. In fact, I remember definitely he was going to send him to jail and he was a blackmailer. That I can remember because Mr. Jose was very fiery on that subject.

Q. Did he attempt to keep you from going on the property?

A. No, not at all. He was very hospitable. He explained what the clay was and just what he was doing.

Q. Is that all of the conversation that you had with him?

A. Yes, I believe that is all.

Mr. Hedges: You may cross examine.

The Court: Any questions?

Mr. Painter: Yes, but our cross examination will [180] probably take at least a half hour.

The Court: All right. So long as I promised to let you go at 4:30 I will keep my word. We will take the regular adjournment until tomorrow morning.

Mr. Hedges: I wonder if I may say this? I have one further witness here, the only one from out of town and he will take only a few minutes. I do not like to take witnesses out of order, but we could get rid of him and send him back home. It will take just a couple of minutes.

(Testimony of Wayne Hodgson)

Mr. Painter: We want to cross examine this gentleman. We have not waived our right to cross examine him.

Mr. Hedges: May I have the indulgence of the court for just a moment?

The Court: You may step down but you will have to come back tomorrow morning at ten o'clock.

Mr. Hedges: If your Honor would permit it, Mr. Fulmer is a school teacher down in Imperial and he would like to get back.

The Court: All right, Mr. Fulmer, take the stand.

Mr. Painter: Mr. Fulmer and Mr. Hodgson, I might state, fall in the same classification. The cross examination of each of them will probably be quite extensive.

Mr. Hedges: You mean as to Mr. Fulmer, too?

Mr. Painter: Yes.

Mr. Hedges: If you are going to cross examine him [181] tonight we will be here the rest of the night.

Mr. Painter: I thought in fairness I had better make that statement.

The Court: He didn't do any work. He merely witnessed the locations.

Mr. Painter: Yes; he was with Mr. Hodgson practically all of the time, your Honor. It is those two witnesses who were the principal locaters.

The Court: I am sorry, gentlemen. We will adjourn until ten o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p.m., a recess was had until 10:00 o'clock a.m., Wednesday, June 4th, 1947.)
[182]

Los Angeles, California, Wednesday, June 4th, 1947.

10:00 A. M.

The Court: Cause on trial.

The Clerk: 6105, Houck and others versus Jose and others.

Mr. Hedges: Ready, your Honor.

Mr. Painter: Ready, your Honor.

Mr. Hedges: Mr. Hodgson, will you take the stand?

WAYNE H. HODGSON,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Painter:

Q. Mr. Hodgson, what time of the day did you arrive on the property on the morning of September 7th, 1945?

A. Sometime before 10 o'clock, about a half hour, I imagine. Around there.

Q. To your observation was there anyone else within sight of you at the time you first arrived at this property?

A. I don't believe so. To the best of my memory, no.

Q. What medium did you use to get to the property?

A. A command car, Army type.

Q. Army type command car. And where did you take up your location when you first arrived at the property? [187]

A. I took it up on the east corner of the property.

Q. Now, you mean by that the easterly boundary line of the property described on Exhibit 1?

A. Yes.

(Testimony of Wayne Hodgson)

Q. Which quarter section did you take up your position on when you first arrived at the property?

A. Well, I drove down the road upon entering the property. I drove down the road, I should say, approximately to the center of the property and looked around. There is sort of a clay hill and the road goes over the top of it and I drove up there and looked around. I was looking for Mr. Lewis and seeing no one on the property I rather suspect I drove back to the easterly boundary and waited there.

Mr. Hedges: Pardon me, Mr. Painter. Did you say the 6th of September, or did you mention a date?

Mr. Painter: I mentioned the 7th, 7th of September.

Q. By Mr. Painter: You understood my question to be referable to the 7th of September? A. Yes.

Q. Now, this Plaintiffs' Exhibit 1 has been marked with the names of two claims—Temperate No. 4 and Tropical No. 2. On which one of those quarter sections did you take up your position after returning from the center of the property?

A. I took it up on the dividing line between the two.
[188]

Q. Between the two? And later that morning did anyone else drive up to the property in an automobile or motor vehicle of any kind? A. Yes.

Q. And describe the first car which drove up to the property?

A. Well, to the best of—I can't tell you truthfully what was the first car. I believe it was Mr. Lewis.

Q. And was there any other car came up to the property and passed you at this point which you have designated as the easterly portion of the property, that morning before ten o'clock? A. I believe so, yes.

(Testimony of Wayne Hodgson)

Q. And describe that car for us.

A. Well, that was a car, a General Motors make of around '37, I believe, and if I remember right it was blue in color. That is all I can remember.

Q. Did you observe where that car drove to after passing you?

A. Well, yes, I believe it drove to the center of the property. You see there, Mr. Painter—

Q. You can step down, Mr. Hodgson, and point it out to me.

A. I believe it drove up into here and stopped. Of course now I was looking for Mr. Lewis, you understand, and [189] I wasn't paying too much attention to this car, but to the best of my knowledge I did look and watch it. I was interested in it, naturally, and I believe it stopped somewhere along in here.

Q. You are pointing to the westerly line of the claim known as Temperate No. 3 on Plaintiffs' Exhibit 1, is that correct?

A. No. I believe it was over here, sir, on the easterly.

Q. On Torrid No. 4? A. Torrid No. 4, yes.

Q. Now, after Mr. Lewis drove up to the property where did you go?

A. Well, I didn't go anywhere then. Mr. Lewis was—he arrived some minutes before ten o'clock. We were supposed to file at ten, and he gave me my instructions to file on Tropical No. 2.

Q. Wait just a second before we get to that point. I just wanted to know where you went. Did you remain for some long or short period of time in relatively the same position on the easterly side of the property?

A. Yes.

(Testimony of Wayne Hodgson)

Q. And did Mr. Lewis leave you at that point sometime before ten o'clock? A. Yes. [190]

Q. And in which direction did he drive?

A. He drove onto the property in a westerly direction.

Q. Now, did anyone stay with you at this point which you have just described? A. Yes.

Q. And who stayed with you?

A. I believe it was Mr. V. G. Fulmer.

Q. Now, of your own recollection and without examining any of the instruments which were introduced in evidence, can you tell me the time of day that it was that you and Mr. Fulmer and—I mean by that either you or Mr. Fulmer—I am not interested for the time being in who actually posted the claim on the property—posted the first notice of location.

A. Yes, very definitely. It was ten o'clock, the first one.

Q. And is there an exhibit in evidence which also refreshes your recollection as to that?

A. I believe so.

Q. And that exhibit is Plaintiffs' Exhibit No. 22, is it not? A. That is right.

Q. Now, will you observe that on the face of this notice of location which affects Plaintiffs' Temperate No. 4, there appears on one place on the front of the exhibit [191] the figures "10:00 a.m." A. Yes.

Q. In whose handwriting is that?

A. That is in my handwriting.

Q. And under the signature "V. G. Fulmer" again appears 10:00 a.m. In whose handwriting is that?

A. Mr. Fulmer's.

(Testimony of Wayne Hodgson)

Q. And did you and Mr. Fulmer place the figures "10:00 a.m." on there immediately after posting the notice on Temperate No. 4?

A. Well, now, do you mean—

Q. I simply mean this, Mr. Hodgson, while you were on the claim, before you went to the next claim to post, did you and Mr. Fulmer place on the claim the figures "10:00 a.m."?

A. Yes.

Q. Now, which claim did you go to next to post?

A. We went to Tropical No. 2.

Q. And that is the one directly to the south of Temperate 4, correct?

A. Correct.

Q. And at what time of the day did you post, you or Mr. Fulmer post a notice of location on Temperate—Tropical No. 2?

A. Well, I should say it was around 10:03 or 10:05—
[192] just how fast we could run over there.

Q. Well, there is an instrument in evidence from which you could refresh your recollection as to the time that you did post it, is there not?

A. Yes.

Q. And that is Plaintiffs' Exhibit No. 24, is that correct?

A. Correct.

Q. And did you and Mr. Fulmer respectively write on the face of that instrument the figures "10:05 a.m." at or about the time you posted the notice?

A. That is right.

Q. Now, after having posted the notice on Tropical No. 2 to what claim did you go next to post a notice of location?

A. (No answer.)

Q. Now, I might state this, that as far as I am concerned in this cross examination, unless the court tells us otherwise, it is perfectly permissible for you to examine

(Testimony of Wayne Hodgson)

the exhibits which are in evidence to refresh your memory before answering the question.

A. Well, let me state, if I may, of course that is all done from memory. You recall when the defendants took my deposition we threshed that all out and the way I have it in my deposition is logical and to the best of my memory the [193] way we went.

Q. Well, now, that is the same thing I want you to do on the stand. I think you have all the exhibits before you now from which you can determine that matter the same as you had when your deposition was taken.

Will you refresh your memory by looking at the exhibits? And I might state I have tried to place them in sequence of time so that they will be quickly available. So, will you give us the next one which is your present recollection that you posted after posting Tropical No. 2?

A. When I call these off would you please point them out on the map for me?

Q. I will, sir.

A. After posting on Tropical No. 2 and Temperate No. 4, I believe we went to Tropical No. 3.

Q. I am pointing to Tropical No. 3. Now, before you proceed further did you or Mr. Fulmer place on the notice of location the approximate hour or put the exact time that the notice was posted? A. Yes.

Q. And what did you place on the claim to indicate that? A. A duplicate of this.

Q. No, I mean what did you write on the claim?

A. I beg your pardon. "10:30 a.m." [194]

Q. And did that indicate the hour at which and the minute at which that claim was posted? A. It did.

(Testimony of Wayne Hodgson)

Q. Now, what claim did you go to next?

A. Well, we must have gone to Frigid No. 4.

Q. I am pointing to Frigid No. 4.

A. Yes, Frigid 4.

Q. And why do you say you "must have gone to Frigid No. 4"?

A. Because we were in a great hurry. We were trying to get through as quickly as possible and it was just a few steps across the quarter section dividing line to Frigid No. 4.

Q. And does Plaintiffs' Exhibit 27 indicate that that was what you did? A. Yes.

Q. And what is there on the claim to indicate that?

A. "10:32 a.m."

Q. And that is the approximate hour and minute?

A. Yes.

Q. At which you or Mr. Fulmer posted that claim?

A. That is correct.

Q. Now, can you tell us where you went next to post a notice? A. We went to Tropical No. 4. [195]

Q. Now, I am pointing to Tropical No. 4 on the map.

A. Yes.

Q. At what time did you and Mr. Fulmer post the notice of location on Tropical No. 4?

A. At 11:25 a.m.

Q. And you got that information by observing Plaintiffs' Exhibit No. 32? A. Yes, sir.

Q. And the hour and minute thereon is the source from which you refreshed your recollection?

A. That is correct.

Q. Then where did you go?

A. We went to Temperate No. 2.

(Testimony of Wayne Hodgson)

Q. And I am pointing to Temperate No. 2. At what time did you or Mr. Fulmer post the notice of location on that property? A. 11:40 a.m.

Q. And from what source did you get that information? A. From Plaintiffs' Exhibit 33.

Q. And that is the hour and minute which appears on that claim, is it not? A. That is correct.

Q. Now, where did you go after posting Temperate No. 2? Before you give us the claim will you tell us the route that you took? I am doing that primarily, Mr. [196] Hodgson, because of the fact that one claim does not bear a time of posting and I wanted to clear that subject up at this time. Now, what course did you take to go to your next posting, place of posting? First, before you go further than that, did you not go back to the highway from Temperate No. 2?

A. That is correct.

Q. And then did you not proceed on that highway westerly to the westerly line of the property?

A. That is correct.

Q. Now, when you got to the westerly line of the property where did you go, according to your best recollection? A. Well, we filed on Torrid No. 3.

Q. And that one I am pointing to now?

A. That is correct.

Q. And at what hour and minute did you post a notice of location at that point? A. 12:25 p.m.

Q. And you gained that information from Plaintiffs' Exhibit— A. 34.

Q. And the hour and minute that appears thereon is the hour and minute you and Mr. Fulmer were on the property with a Mr. Bradshaw, is that correct? [197]

A. That is correct.

(Testimony of Wayne Hodgson)

Q. By the way, on this claim appears for the first time, I believe, the name of Mr. Bradshaw—that is on any notice of locations which were posted by you as I understand it, is that correct?

A. I believe that is correct, yes.

Q. In other words, is it not a fact that on your way back from Temperate No. 2 across the property on the roadway, you picked up Mr. Bradshaw at a point which I am pointing to on the map at the present time at about that location?

Mr. Hedges: Would you indicate that point for the record?

The Witness: Yes, that is true where you are indicating to the best of my knowledge.

Q. By Mr. Painter: I have indicated, have I not, the point at which the quarter section lines of Torrid 4, Temperate 3, Tropical 1, and Frigid 2 intersect, is that correct, Mr. Hodgson?

A. I believe it is a section line, isn't it?

Q. Yes, it is the very center of the property.

A. That is correct.

Q. Now, where did you go after posting Torrid No. 3?

A. We went to Frigid No. 1.

Q. And who was with you at that time?

A. Mr. Bradshaw and Mr. Fulmer.

Q. And at what time of the day, hour and minute, did [198] you and/or Mr. Bradshaw and Mr. Fulmer post the notice on Frigid 1?

A. At 12:30 p.m.

Q. And from what source did you get that hour and minute?

A. From Plaintiffs' Exhibit 35.

Q. And there appears the figures 12:30 p.m. in three places on that claim, is that correct?

A. That is correct.

(Testimony of Wayne Hodgson)

Q. And after one of them is in your handwriting?

A. That is correct.

Q. One of them is in Bradshaw's handwriting and one is in Fulmer's handwriting?

A. That is correct.

Q. Now, where did you go after posting the claim on Frigid 1? A. We went north to Torrid No. 1.

Q. Now, before we leave this point will you examine the claim on Frigid 3 and you noted of course that it did not bear a time. Is it your present recollection that Frigid No. 3 was a notice of location that was posted on Frigid 3 before you posted Torrid 3 and Frigid 1, or after you posted Torrid 3 and Frigid 1, or after you posted Torrid 1?

A. Well, I believe that we posted Frigid No. 3. Would [199] you point to it there? Yes, I believe we posted Frigid No. 3 before we posted Torrid No. 1.

Q. In other words, then, as I gather it, your next move was from Frigid 1 down to Frigid 3, is that correct?

A. Let me think just a minute here, Mr. Painter. Like I said before, we were in a command car and I remember that the road to Frigid No. 3 from Torrid No. 2 or Frigid No. 1 was a very good road.

Q. That was Torrid 3 you are speaking of?

A. Yes.

Q. Or Frigid 1? Frigid 1 was a good road down to Frigid 3? A. Yes.

Q. And you were able to drive down to that in the command car?

A. I would say we were able to drive down to that at the rate of 20 miles per hour.

(Testimony of Wayne Hodgson)

Q. Now, when you went up to Torrid 1, however, you had to walk up there, didn't you?

A. (No answer.)

Q. I am trying to orient you here now, Mr. Hodgson. I am not trying to confuse you. I want your best recollection as to the sequence of the postings here so I can get some approximate time and I don't want to lead you but I want you to take into consideration the time element [200] involved.

A. I understand. That is what I am trying to figure out here. I can't recall whether we walked that or drove it. I know I have driven it several times later on.

Q. Let us handle it this way then. You will note that the time on Exhibit 36 written in the handwriting, I assume, of Hodgson, Bradshaw and Fulmer, is 1:15. Now, is that the approximate time that you posted the notice on Torrid No. 1? A. Yes.

Q. Is it your present recollection that from the point which I am designating on the map, which is the westerly point where the quarter section lines of Torrid 3 and Frigid 1 meet, that you walked to the point where you posted Torrid 1?

A. I don't think we did, Mr. Painter.

Q. You do not think you did?

A. No; because that is a mile over sandy country and according to the time here it took us 45 minutes. If we didn't post Frigid No. 3 in the meantime I rather suspect, in fact I am very sure that we drove to that. Now, Mr. Fulmer, of course, was with me and maybe he will have something else to say about that.

Q. All right, that is your best recollection?

A. That is my best recollection, yes. [201]

(Testimony of Wayne Hodgson)

Q. Then am I to understand that your course after posting Frigid 1 was down to Frigid 3 in the command car, back to the neighborhood of the postings on Torrid 3 and Frigid 1 and then northerly to the point where you posted Torrid 1?

A. That is correct to the best of my knowledge.

Q. And approximately what time of the day, hour and minute, is it your present recollection that you posted the notice on Frigid 3; and will you examine the exhibits before you answer that question, and give us your best recollection—estimate?

A. I would say it approximately was 12:45 p.m.

Q. Now, may I take you step by step here and see if this is not the true and correct statement of the course which you took that morning and if I am incorrect in any respect will you advise me as we are going along, stop me when I reach that point.

You took up your position on the property at shortly before ten o'clock on the corner of the claim known as Temperate 4 at the point which I have pointed to with the pointer, is that correct?

A. That is correct.

Q. You then went across the highway to the point which I am now pointing to on Tropical 2, is that correct?

A. That is correct.

Q. You then went back to your automobile and drove in [202] a westerly direction until you arrived at the point which I am now pointing to on the diagram and then drove in a westerly, in a southeasterly direction to a point which I am now pointing to, is that correct?

A. That is correct.

Q. You then returned by approximately the same route to the point which I am now pointing to, is that correct?

A. That is correct.

(Testimony of Wayne Hodgson)

Q. You then drove easterly until you reached the easterly side of the property and then drove in a south-easterly direction to a point which I am now pointing to on the map, is that correct?

Mr. Hedges: I don't so understand his testimony, Mr. Painter.

Mr. Painter: What is it?

Mr. Hedges: To Frigid No. 4.

Mr. Painter: I will correct that. Just a second.

The Witness: I might say right here now that, of course, my memory was very vague as to that but—

Q. By Mr. Painter: You had better let me give you one point that I missed, that Mr. Hedges brought to my attention. We had reached the point which I had pointed to, being the point in the center of the property where Temperate 3 and Torrid 4 and Frigid 2 and Tropical 1 meet. Then I took you in a southeasterly direction to Tropical 3 and then [203] over to Frigid 4. Now, I take you back to the highway, to that same point in the center of the property. Is that approximately correct?

A. Well, yes, it would be approximately correct, although, of course, we had to go down washes.

Q. I understand that but I am giving you the general direction, Mr. Hodgson.

A. I might add to that we usually come out right in the center. You understand the center of that section now goes easterly, easterly right in there and that is where we usually came out.

Q. You usually came out about here?

A. Yes, I would say a little farther east.

Q. About in there? A. Yes.

(Testimony of Wayne Hodgson)

Q. Now then, you proceeded in an easterly direction and to the easterly line of the property and then proceeded in a southeasterly direction to Tropical 4, did you not? A. I believe so.

Q. And then back by the same route to the roadway and then northerly to the property described as Temperate 2, is that approximately correct?

A. Approximately correct.

Q. Then back to the highway then in a westerly direction, across the highway to the westerly line of the property, [204] is that correct?

A. Yes, I believe so.

Q. Then after the posting on Torrid 3 you go across to Frigid 1 and then you drove southerly to Frigid 3?

A. Right.

Q. Am I correct so far? A. So far, yes.

Q. Then back to the highway and northerly to Torrid 1? A. I believe that is right.

Q. Then back to the highway, is that correct?

A. Yes, back to the highway and then I think back to the center of the property, if you want to go that far.

Q. After you reached the highway, at some point along here, then you drove easterly on the property, is that right? A. I believe that is right.

Q. Now, Mr. Fulmer was with you when you arrived at each one of the claims which bear his signature, was he not? A. That is correct, yes.

Q. I don't know whether I asked you this or not, but it may be a little repetitious. Is it your present recollec-

(Testimony of Wayne Hodgson)

tion you picked up Bradshaw somewhere along the roadway when you were coming back from Temperate 2, headed for Torrid 3 and Frigid 1?

A. You asked that question. [205]

Q. I did? A. Yes.

Q. And that was the situation?

A. That is right.

Q. Then Mr. Bradshaw stayed with you from the time you picked him up until you arrived back to somewhere around the center of the property after having posted Torrid No. 1, is that correct?

A. Will you point out Torrid No. 1 there?

Q. Right here.

A. I believe so, yes, according to these.

Q. Mr. Hodgson, would you step down and with this blue pencil mark approximately the location of your notice of location on Temperate 4. Now, will you mark that with the figure 1 and then put a circle around it?

Mr. Hedges: Will you instruct the witness to bear in mind that map is drawn to scale because he might otherwise just put it anywhere and it wouldn't reflect the proper location.

Mr. Painter: I might state at this point I am not after the fixing of these points as to scale. We will understand that ahead of time.

Mr. Hedges: Position is all you want?

Mr. Painter: Just position is all I want.

The Witness: It is one of these. I believe that is the [206] one.

(Testimony of Wayne Hodgson)

Q. By Mr. Painter: Now, you have circled the red square which now is marked 1, is that correct?

A. That is correct.

Q. Now, go to Tropical 2 and do the same thing, please. Now, draw a little line out and put a figure 2 right alongside of it. Put a figure 2 there.

Now, will you go down to Tropical 3 and do the same thing on Tropical 3?

A. You want the figure 3 there?

Q. Yes. When you get through marking that with a 3 will you go to Frigid 4 and do the same thing on Frigid 4 and mark it with a 4? Now, will you go to Tropical 4 and do the same thing and mark that with a 5?

Now, will you go to Temperate 2 and do the same thing there and mark it with a 6?

Now, will you go to Torrid 3 and do the same thing and mark it with a 7?

Now, will you go to Frigid 1 and do the same thing and mark it with an 8?

Now, go to Frigid 3 and do the same thing and mark it with a 9; and to Torrid 1 and do the same thing and mark it with a 10.

That is all the cross examination.

The Court: Any redirect examination? [207]

Mr. Hedges: No, no redirect examination.

The Court: Step down. Call your next witness.

Mr. Hedges: Mr. Fulmer.

V. G. FULMER,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Virgil G. Fulmer.

Direct Examination

By Mr. Hedges:

Q. Where do you reside, Mr. Fulmer?

A. 865 Olive Avenue, El Centro, California.

Q. What is your business or profession or occupation?

A. I am in public school work.

Q. And did you go out on the project described in Plaintiffs' Exhibit 1 on the 6th of September, 1945?

A. Yes, sir.

Q. Do you recall about what time of day?

A. Well, I think it was around seven o'clock in the morning. They had planned on being out there around seven o'clock and I think we arrived at that time or shortly after.

Q. And who else was there besides yourself, Mr. Fulmer, if you can recall?

A. Well, in the car that I rode in Mr. Bradshaw of [208] El Centro and Mr. Lewis and Mr. Houck, and when we arrived at the property there were some other people there.

Mr. Painter: May we at this time have it understood, your Honor, we have the same objections as we interposed yesterday to anything relative to what took place on the 6th of September 1945?

The Court: All right.

(Testimony of V. G. Fulmer)

Q. By Mr. Hedges: Was Mr. Hodgson there?

A. Hodgson was there. He was either on the property or at the edge of the property when we arrived.

Q. I will show you Plaintiffs' Exhibit 14 and ask you to examine it and see whether or not you have ever seen that document before? A. Yes, sir.

Q. And is that your signature at the bottom of it under the heading "Witnesses"? A. Yes, sir.

Q. V. G. Fulmer, September 6th, 1945?

A. Yes.

Q. 2:16 p.m.? A. Yes, sir.

Q. And that is in your handwriting and the date and time are in your handwriting?

A. That is right, sir.

Q. And did you witness the filing of the claim on [209] that location known as Torrid No. 1 on September 6th, 1945? A. Yes, sir.

Q. Did you see Mr. Lewis post the location and—strike that. Was there a duplicate of Plaintiffs' Exhibit 14 with you and Mr. Hodgson and Mr. Lewis at the time this was posted?

A. There were two copies. This looks like the duplicate here.

Q. Was the duplicate of this instrument actually placed in the glass jar that you heard testified to here yesterday?

A. Well, it was either the duplicate or the original.

Q. It was a document the same as the one I am now showing you? A. That is right.

Q. And you saw Mr. Lewis place that in the glass jar and you witnessed it by signing your name as did Mr. Hodgson in your presence, is that correct?

A. Yes, sir.

(Testimony of V. G. Fulmer)

Q. Now, were you also out on the same property on September 7th, 1945? A. Yes.

Q. Which was the following day? A. Yes, sir.

Q. And were the same parties present at that time?
[210]

A. Well, some of them who were there on the 6th. I don't believe Mr. Hough was there on the 7th.

Q. Was Mr. Lewis there?

A. Mr. Lewis was there.

Q. And Mr. Hodgson? A. Yes, sir.

Q. And yourself? A. Yes, sir.

Q. Now, the only claim that you had anything to do with, as I understand on the 6th, was the one that I have just asked you about, Plaintiffs' Exhibit 14, is that correct?

A. Well, I am not positive about that. My position was as a witness to the filing of the claims only.

Q. Now, I show you Plaintiffs' Exhibit 22, which is a location notice affecting the Southeast Quarter of Section 21, the claim known as Temperate No. 4. I call your attention to the signature at the bottom of the page under the heading "Witness: V. G. Fulmer, September 7th, 1945, 10:00 a.m." Is that your signature?

A. That is right.

Q. Did you sign it on the date that it bears?

A. Yes, sir.

Q. And you timed it at that time? A. Yes, sir.

Q. And did you witness Mr. Hodgson's—strike that.
[211] Was there a duplicate of this instrument in your possession at that time? A. Yes.

Q. And was this duplicate instrument placed in the glass jar? A. Yes.

Q. At the location? A. Yes.

(Testimony of V. G. Fulmer)

Q. And you so witnessed and there were no other witnesses beside yourself? A. No.

Q. I show you Plaintiffs' Exhibit 24, which is a location notice affecting the Northeast Quarter of Section 28 on a claim known as Tropical No. 2, dated September 7th, 1945, incidentally, as was the last exhibit that I showed you, No. 22. A. Yes.

Q. And calling your attention to the signature appearing down at the bottom of the page under the heading "Witnesses: V. G. Fulmer, September 7th, 1945, 10:05 a.m." and I ask you if that is your signature?

A. Yes, sir.

Q. And did you witness the filing of the duplicate of this claim at the time that the instrument bears?

A. Yes, sir. [212]

Q. The hour and the date? A. Yes, sir.

Q. I show you Plaintiffs' Exhibit 26, which is a location notice affecting the Southwest Quarter of Section 28 on a claim known as Tropical No. 3, dated September 7th, 1945, and call your attention to the signature appearing at the bottom of the page under the heading "Witnesses: V. G. Fulmer, September 7th, 1945, 10:30 a.m." and ask you whether that is your signature?

A. It is.

Q. And did you sign your signature on the date that the instrument bears, September 7th, 1945?

A. Yes, sir.

Q. And at the time and at the hour the instrument bears, 10:30 a.m.? A. Yes, sir.

Q. And was the duplicate of that instrument placed in the glass jar on the location? A. Yes, sir.

Q. I now show you Plaintiffs' Exhibit 27, which is a location notice affecting the Southeast Quarter of Sec-

(Testimony of V. G. Fulmer)

tion 29, on a claim known as Frigid No. 4, dated September 7th, 1945, and call your attention to the signature appearing at the bottom of the page under the heading "Witnesses: V. G. Fulmer, September 7th, 1945, 10:32 a.m." and ask you whether [213] or not that is your signature? A. It is, yes, sir.

Q. And did you sign the instrument on the date it bears and the hour it bears? A. That is right.

Q. And was a duplicate of that instrument placed in the glass jar on the location? A. It was.

Q. And in your presence? A. That is right.

Q. I show you Plaintiffs' Exhibit 32, which is a location notice affecting the Southeast Quarter of Section 28 on a claim known as Tropical No. 4, dated September 7th, 1945. I call your attention to the signature at the bottom of the page under the heading "Witnesses: V. G. Fulmer, September 7th, 1945, 11:25 a.m.," and ask you whether or not that is your signature?

A. Yes.

Q. And did you sign the instrument on the date that it bears and at the hour? A. Yes, sir.

Q. That it bears? A. That is right.

Q. And was a duplicate of that instrument placed in the glass jar on the location? A. Yes, sir. [214]

Q. I show you Plaintiffs' Exhibit 33, which is a location notice affecting the Northeast Quarter of Section 21 on a claim known as Temperate No. 3, dated September 7th, 1945. I call your attention to the signature appearing at the bottom of the page under the heading "Witnesses: V. G. Fulmer, September 7th, 1945, 11:40 a.m.," and ask you whether or not you signed it? Is that your signature? A. Yes, sir.

(Testimony of V. G. Fulmer)

Q. And did you sign it on the date that it bears?
And at the approximate hour? A. Yes, sir.

Mr. Hedges: That should be Temperate No. 4, Mr. Reporter.

Q. By Mr. Hedges: And a duplicate of this, I believe you said was placed in the jar at this location?

A. Yes, sir.

Q. I now show you Plaintiffs' Exhibit 34, which is a location notice affecting the Southwest Quarter of Section 20, on the claim known as Torrid No. 3. It is dated September 7th, 1945. I call your attention to the signatures appearing at the bottom of the page under the heading "Witnesses: V. G. Fulmer, September 7th, 1945, 12:25 p.m.," and W. W. Bradshaw, September 7th, 1945, 12:25 p.m., and ask you whether or not the signature of V. G. Fulmer is your signature? [215] A. It is.

Q. And did you sign it upon the date that the instrument bears and at about the approximate hour it bears?

A. That is right.

Q. And did Mr. Bradshaw sign in your presence and at the same time? A. Yes, sir.

Q. And was a duplicate of this instrument placed in the glass jar on the location? A. Yes, sir.

Q. I show you Plaintiffs' Exhibit 35, which is a location notice affecting the Northwest Quarter of Section 29 on a claim known as Frigid No. 1, dated September 7th, 1945. I call your attention to the signatures appearing under the heading "Witnesses" at the bottom of the page—W. W. Bradshaw, September 7th, 1945, 12:30 p.m., and V. G. Fulmer, September 7th, 1945, 12:20 p.m., and ask you whether or not the signature V. G. Fulmer is your signature? A. It is.

(Testimony of V. G. Fulmer)

Q. And did you sign the instrument on the date that it bears and at the approximate hour? A. Yes, sir.

Q. And did Mr. Bradshaw sign in your presence?

A. Yes, sir.

Q. At or about the same time? [216]

A. Yes, sir.

Q. And was a duplicate of this notice posted in a glass jar—placed in a glass jar on the location?

A. Yes, sir.

Q. I show you Plaintiffs' Exhibit 36, which is a location notice affecting the Northwest Quarter of Section 20 on the claim known as Torrid No. 1, dated September 7th, 1945. I call your attention to the signatures appearing at the bottom of the page under the heading "Witnesses: W. W. Bradshaw, September 7th, 1945, 1:15 p.m., and V. G. Fulmer, September 7th, 1945, 1:15 p.m.," and ask you whether or not the signature "V. G. Fulmer" is your signature? A. Yes, sir.

Q. Did you sign it on the date the instrument bears?

A. Yes, sir.

Q. And at about the approximate hour?

A. Yes, sir.

Q. Did Mr. Bradshaw sign in your presence?

A. Yes, sir.

Q. And at the same time? A. Yes, sir.

Q. And was a duplicate of this instrument placed in the glass jar on the location? A. Yes, sir.

Q. Now, is this the sequence of the postings that I [217] have related here to you? In other words, did you post these claims in this sequence?

A. Well, the time on it that they were posted here will tell you.

(Testimony of V. G. Fulmer)

Q. That refreshes your memory as to how you posted them?
A. That is right.

Mr. Hedges: You may cross examine.

The Court: Before you begin the cross-examination we will take a short recess.

(Short recess.)

The Court: You may proceed.

Cross-Examination

By Mr. Painter:

Q. Mr. Fulmer, you were present in court while Mr. Hodgson was testifying, were you not?

A. Part of the time.

Q. Were you present this morning when he was designating the course by numbers which he took when posting on the morning and afternoon of the 7th of September, 1945?

A. I saw Mr. Hodgson making some marks on the plat that you have there on the blackboard. I didn't know what they were.

Q. Well, to simplify this question—

The Court: He gave a numerical order to indicate the [218] course that you traveled from one to ten.

Q. By Mr. Painter: I will point those out on the diagram so you will know where each number is located.

A. Yes, sir.

Q. One to two, to 3, to 4, to 5, to 6, to 7, to 8, to 9, to 10.

A. To the best of my recollection that is the sequence of the filings we made.

Mr. Painter: That is all, thank you very much.

Mr. Hedges: Step down, Mr. Fulmer.

I will call Mr. Witmer.

PAUL B. WITMER,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Paul B. Witmer.

Direct Examination

By Mr. Hedges:

Q. Where do you reside, Mr. Witmer?

A. Santa Ana, California.

Q. What is your business, profession or occupation?

A. I am the acting manager of the Bureau of Land Management.

Q. Is that what is commonly known as the General Land [219] Office for this district?

A. Formerly, yes, formerly known as the District Land Office.

Q. And how long have you been so engaged in that occupation? A. 12 years.

Q. And as such director do you have under your jurisdiction and supervision and control the records of the Land Office for this district? A. I do.

Q. Do you have in your possession and with you a map-book showing the area as described on the board here in Plaintiffs' Exhibit 1, being Sections 20, 21, 28 and 29, Township 14 South, Range 12 East, San Bernardino Meridian? A. I do.

Q. Now, will you turn to the page of the book that indicates that particular area, please? You are indicating that there are two pages in your official records that describe the area that I have just indicated.

A. That is right.

(Testimony of Paul B. Witmer)

Q. Now, will you turn to the first page and will you tell me is there anything on this—strike that. As part of your records of the Department of Land do you indicate on the marginal side of the record any orders or memorandums that are received from the Department of Interior or from the [220] President or any Congressional orders? A. We do.

Q. Is that done in the ordinary course of the business of your office? A. Yes, sir.

Q. Were these four sections of land, 20, 21, 28 and 29, of Township 14 South, Range 12 East, opened for entry on or before September 7th, 1945?

A. Well, they were, under the first form they were—under the first form all withdrawn.

Q. Will you tell me if your records indicate when the lands were withdrawn from entry if they were?

A. Well, it was all withdrawn, the first form, on the 10-22-20.

Q. That is October 22, 1920? A. That is right.

The Court: Who made that withdrawal? I think it was a President Coolidge withdrawal. That has come up several times.

Q. By Mr. Hedges: Will you read me what you are indicating?

Mr. Wood: I think this was a Department of Interior withdrawal—the Secretary of the Interior rather than the President.

Q. By Mr. Hedges: Will you read me what is contained [221] there?

A. "All of the township withdrawn by the first form by F." We refer to that, the number of the letter—10-22-20, and the Act 1702, Order dated 10-19-20.

(Testimony of Paul B. Witmer)

The Court: The reference is to the Act of Congress under which the withdrawal was made?

The Witness: That is right.

Mr. Wood: It was a general statute.

Q. By Mr. Hedges: And reference to an order dated October 19, 1920, is that correct?

A. That is right.

Q. Then was there any re-opening of that land for entry and if so when? As indicated by your official records?

A. Well, there has been no re-opening.

Q. Well, don't your records indicate it was re-opened?

A. Let me check this just a minute. There was another withdrawal by the War Department.

Q. All right, will you read what your records indicate in that respect?

A. That was an Executive Order, 82141—no, that was revoked by the Secretary, his order of July 6, 1945.

Q. In other words, do your records indicate that it was withdrawn by the War Department to be used for combat firing ranges and maneuvering purposes on August 21, 1941? And then re-opened by— [222]

A. That is right.

Q. By an order of the—

A. In regard to the war.

Q. Order of the Secretary of the Interior by an order dated July 6th, 1945? A. That is correct.

Q. Now, from the period from October 19, 1920 to July 6th, 1945, was the land opened for entry or for the filing of any mining claims? A. It was not.

Q. In other words, the first date that it was open for entry would be pursuant to the order of July 6th, 1945, is that correct? A. That is correct.

(Testimony of Paul B. Witmer)

Q. Are you familiar with the order of July 6th, which was the order of the Secretary of the Interior, as to the time element as to when that order would become effective? Do your records— Can you refresh your memory from the records regarding that?

A. I don't know that it is in this book. I would have to check.

Q. What do the records indicate on that, Mr. Witmer?

A. Jurisdiction to be vested in the Department of the Interior under order of 10-19-20, on the 63rd day from July 8th at 10:00 a.m. the land will be subject to mineral [223] locations subject to stipulations listed by order July, K.

Q. That is an 8 crossed out?

A. July 6th-K, 82545 to mineral locations. Correction in the date should be made to read "July 6th" instead of July 8th.

Q. And the words "Federal Register"?

A. Federal Register, yes.

Q. Now, do the records of your office indicate that anyone applied for—applied to your office for a mining location at any time between October 19th, 1920 and prior to September 6th, 1945?

A. I am afraid I can't answer that question without going back and checking the records.

Q. Let me put it this way: Did you notify anyone, did your office notify anyone subsequent to October 19th, 1920, that the land was withdrawn? A. Yes, sir.

Q. Do you recall when that was done?

A. On October 18th, 1934, there was an application filed by John Andrew Jose, and on the 19th it was suspended for action that the land was withdrawn under the first formal reclamation withdrawal.

(Testimony of Paul B. Witmer)

Q. Do your records indicate that Mr. Jose was so advised at that time?

A. Well, it is customary to send out a notice. [224]

Q. You mean that is the custom of your office and has been as long as you have been with them?

A. Yes, sir.

The Court: What is the date of that notice?

The Witness: That would be October 19th, 1934.

The Court: All right.

Q. By Mr. Hedges: And the testimony that you have just given you have read from—

A. Serial Book No. 52—That would be Serial No. 052212, an application for oil and gas lease.

Q. All right.

Mr. Hedges: Although I don't believe this is necessary, your Honor, I have a certified copy of the Secretary of the Interior's order of—

The Court: It is well to have it before me. We have so much litigation, gentlemen. Just give me a paper copy whether it is certified or not.

Mr. Hedges: I have the certified copy and would like to offer it as Plaintiffs' next in order.

The Court: It will be received. It is well to have them. The pattern changes from day to day.

The Clerk: Plaintiffs' Exhibit 47 in evidence.

(The document referred to was marked as Plaintiffs' Exhibit 47, and was received in evidence.)

Mr. Hedges: I would like to offer Plaintiffs' next in [225] order a typewritten copy of the Executive Order, No. 8865, signed by Franklin D. Roosevelt on August 21st, 1941, withdrawing the lands for use for the War

(Testimony of Paul B. Witmer)

Department for combat firing ranges and maneuver purposes.

The Court: All right.

(The document referred to was marked as Plaintiffs' Exhibit 48, and was received in evidence.)

Mr. Hedges: And as Plaintiffs' next in order I would like to offer a clipping from the Federal Register—strike that, please.

I would like to offer as Plaintiffs' next in order a certified copy of Public Lands Order No. 287, which is the order re-opening these lands for entry, dated July 6th, 1945, as corrected in the Federal Register.

The Court: It may be received.

(The document referred to was marked as Plaintiffs' Exhibit 49, and was received in evidence.)

Q. By Mr. Hedges: Do your records indicate that anyone applied subsequent to October 20th, 1920—strike that.

Do your records indicate that anyone applied subsequent to October 19th, 1920, to have the Government reopen these lands for entry? A. Yes, I think there was.

Q. Can you refer to your official books there and give me the date and the name of the person? [226]

A. I don't happen to have those records here.

Q. Do you know of your own knowledge if anyone did that and if so who and at what time?

A. There was, oh, I think sometime—I don't recall just the exact time but there was a letter sent in asking that the land be classified within the last year or so, if that is close enough.

(Testimony of Paul B. Witmer)

Q. Well, can you check the records in your office and give us the date and the name of the person?

A. I can do that.

Mr. Painter: Can't we stipulate as to that, gentlemen? I have the memo which we took—

Mr. Hedges: All right.

Mr. Painter: Gentlemen, my trial brief shows that in Book 56-D of the Serial Register, Serial No. 056831, appears the notation of an application to restore the property for mining locations. It was executed by Stanley B. Houck, Hattie M. Houck, Wilna Sherard, Ruth M. Hebbard, Ruth Edling, Minnie McKenzie, Veronica Ghostley, Edward H. McKenzie—

The Court: What is the place in the Federal Register?

Mr. Painter: Book 56-D of the Serial Register.

Mr. Hedges: That is in the office of the District Land Office in Los Angeles.

Mr. Painter: That is right

The Court: That doesn't refer to the Federal Register? [227]

Mr. Hedges: No, just another application.

Mr. Painter: And the serial number 056831 in the District Office.

The Court: All right.

Mr. Hedges: I am willing to so stipulate.

The Court: Very well, gentlemen.

Mr. Painter: There is just one other matter. Maybe I am being just ultra-cautious but your Honor observed

(Testimony of Paul B. Witmer)

there was an error in the Federal Register and it was subsequently corrected.

The Court: That is right.

Mr. Painter: May we stipulate that the correction order was that it was the 63 days from the 6th of July, 1945 at 10:00 a.m. that the property was opened for that?

Mr. Hedges: I would not stipulate to the wording but I will stipulate the date the order was signed was July 6th, and it appears on the photostatic copy of Plaintiffs' Exhibit 49.

The Court: All right.

Mr. Painter: I think I used the exact words.

Mr. Hedges: You may have. You may cross examine.

Mr. Wood: Just a couple of questions.

Cross Examination

By Mr. Wood:

Q. Will you open your book here in connection with [228] Serial No. 052212? There was an application filed on the 18th day of October, 1944, which was suspended.

A. '34.

Q. '34, which was suspended by stipulation, is that correct? A. That is right.

Q. And that was for an oil and gas permit on the land? A. Yes, sir.

Q. Now, on the 25th day of October of the same year an amended application was filed and sent to the General Land Office, is that correct? A. That is correct.

(Testimony of Paul B. Witmer)

Q. And in 1936 you have a notation here as of August 27th. What was done with respect to that application?

A. Transmitted a permit issued August 22nd, 1936, —mailed a permit to the permittee.

Q. By Mr. Wood: In other words, a prospecting permit on these particular sections was issued by the Government, is that right?

A. Maybe I had better read this all right through here.

Q. Yes.

A. Then on December 15th, 1937 an application to exchange the permit for oil and gas lease filed and that was sent to the General Land Office at that time. [229]

Then there was a letter that advised the permittee is allowed an extension to December 3rd, 1938—he will be allowed to elect whether he now wants a lease and a notice was sent out on August 3rd, 1938 and service was had on August 6th. And on August 11th, the applicant filed a request to have action taken on his application for a lease and it was sent to the General Land Office by special mail.

Then on September 12th, there was an application to authorize the applicant to execute lease forms and execute a bond. No rentals requested for the first two years of the lease—required for the first two years of the lease.

Then on the 13th a notice was sent to the claimant by registered mail and on September 21st, service was had by registered mail. And on October 19th the application for extension of time to procure bond.

(Testimony of Paul B. Witmer)

January 26th, 1939, lease forms were signed and returned without bond. On February 8th they were forwarded with report to the General Land Office.

On the 23rd of May, 1940, a copy of the letter, N-51640 addressed to the permittee allowing 30 days to initial stipulations under Section 2-a.

On the 29th of August, 1940, a letter, N-82340, transmitted a lease dated January 1st, 1939, to the lessee.

On October 18th, 1940, a letter, N-101240, sent directly to lessee requiring bond or payment of rental. [230]

On 1/3/41 request for cancellation of lease filed. That went to the General Land Office. Advised lease was cancelled and closed.

Mr. Hedges: That was March 6th, 1941 you advised the lease was cancelled and the matter was closed?

The Witness: Yes, sir.

Q. By Mr. Wood: Do you have any record to show how this was withdrawn or how this land was re-opened after it was withdrawn under the first form of the Secretary's withdrawal so there could be an oil and gas lease put on these premises?

Mr. Hedges: That is objected to as being wholly incompetent, irrelevant and immaterial. We are not concerned with oil and gas leases here. We are concerned with whether or not a person could or could not file a mining claim.

The Court: I think it is asking for a legal question. That is a question of law for me to determine. A right

(Testimony of Paul B. Witmer)

could not be granted to the public domain in violation of a Presidential order.

Mr. Wood: That is correct. It might be entirely void, the Act that we have been reading from, the book here. What I want to find out is whether they have anything in the record to show their right to issue that lease.

The Court: I don't think I am interested in that. The question whether it is valid or invalid depends upon the [231] terms of the withdrawal and the Act of 1920. If that shows there was a withdrawal for all purposes only another action by the Secretary could restore them.

Mr. Wood: That is true, unless in their records somewhere there was some other action of the Secretary prior to the issuance of this lease and that is what I am trying to find out.

The Court: He has already testified there was no restoration. There would have to be a restoration of a withdrawal.

Mr. Wood: That is right.

The Court: It is all a question of law. I don't think we should subject this witness to such an inquiry at all.

Mr. Wood: Very well.

Mr. Hedges: No further questions. If your Honor please, it is ten minutes of 12 and I would like to recall Mr. Lewis for just a couple of questions and then we will rest.

The Court: Very well.

HAROLD W. LEWIS,

called as a witness by and on behalf of the plaintiffs, having been previously duly sworn, was recalled and testified further as follows: [232]

Direct Examination (Continued)

By Mr. Hedges:

Q. I show you, Mr. Lewis, Plaintiffs' Exhibits 6 through 37, inclusive, and ask you to look at the reverse side of each one of the exhibits where the printed wording, "Statement of Discovery Work Performed," and under that: "The locator has performed discovery work as required by Section 2304, Public Resources Code, as follows."

Will you just check the wording that is written in each instance? A. Do you want me to read this?

Q. No, just check it. Does the language on each of those exhibits appear to be substantially the same?

A. Yes.

Q. That is that more than ten cubic yards of material had been mined and moved and that more than \$160.00 had been spent in development work on each of the claims. Is that correct? A. Correct.

Q. And you signed each one of these and caused each one to be recorded? A. I did.

Q. On the date that it bears? A. I did.

Q. Now, was all of the work that you have set forth in each of those statements, or each of those claims—had [233] all of that work been performed prior to the time that you recorded each of the claims? A. It had.

Q. Now, you have been in the courtroom and did you hear Mr. Hodgson testify that he performed some work,

(Testimony of Harold W. Lewis)

together with some high school boys, on Torrid 1 and on Temperate 2? A. Yes.

Q. After he had completed the work on those two locations was any further work performed on them?

A. He did not complete the one up in the corner. I can't see it from here.

Q. Referring to Torrid No. 1?

A. Yes; he didn't complete that work. They worked about a day and a half or day and three-quarters on this one over here.

Q. Referring to Temperate No. 2?

A. Yes. And the payroll book shows the number—I think 10 or 11 or 12 boys worked and then we moved over to the Northwest Corner—I can't see it from here.

Q. Step right down if you wish.

The Court: You may step down.

A. We moved the crew up here and they finished out the day.

Q. Referring to Torrid 1?

A. Yes. Now, that was on a Sunday because those boys [234] were high school boys and only worked Saturdays and Sundays and then we finished up the work with an additional crew of Mexican help that we had, that we had moved from various places.

Q. In other words, what I am getting at is, there was more work performed on the location known as Torrid No. 1 and more work performed on the location known as Temperate No. 2 in addition to what Hodgson and his high school boys performed?

A. Yes, that is correct, because they could only work on Saturday and Sunday so we had to finish up on non-school days.

(Testimony of Harold W. Lewis)

Mr. Hedges: You may cross examine.

Mr. Painter: No cross examination.

Mr. Wood: I have a couple of questions.

Cross Examination

By Mr. Wood:

Q. Mr. Lewis, you paid everybody out there a standard price of \$1.00 an hour except the foremen?

A. That is right.

Mr. Wood: That is all.

The Court: Step down.

Mr. Hedges: The plaintiffs rest, your Honor. May I ask, have you decided or conferred with the court, as to the manner of putting on the defense, as to who is going to be [235] first? There are two sets of defendants here.

The Court: I don't care about that. You may arrange that among yourselves.

Mr. Painter: Well, I assumed in view of the fact that we were the last named that we would put on our defense last. The Jose group is the next group named.

The Court: All right, Mr. Wood.

Mr. Wood: We were under the assumption we were going on last and I asked the witness from Imperial Valley to be here in the morning.

The Court: Well, I can't waste a half day, gentlemen. Someone will have to go forward.

Mr. Wood: I asked yesterday when they would be through and they assured me—

The Court: You should never do that in my courtroom, Mr. Wood. Somehow or other we seem to be able to get along faster than counsel anticipates.

(Testimony of Harold W. Lewis)

Mr. Painter: There is this situation, your Honor. The reason I suggested that procedure was because I have a defense which may be applicable to both of these groups, to plaintiff and the Jose defendants. I may ask the court to permit me to put on that defense in rebuttal, as to both of those defendants, or after the Jose group finishes. That is why I assumed we would go ahead as the third group rather than the second group. In other words, I would like to put [236] on all my evidence—

The Court: I don't think it makes any difference, gentlemen, in these cases when they are tried without a jury, the order in which you put on your defense. You have cross claims and you will put in all your evidence whether it relates to one or the other.

Mr. Painter: That wasn't the point involved.

The Court: Regardless of the question of order.

Mr. Painter: That was not the question involved. The one witness whom I was going to put on for that defense may not be available at the time I finish with my evidence in regard to the locations and recordings.

The Court: I don't know how you are going to arrange it but somebody is going to have to go on at two o'clock.

Mr. Painter: I shall be prepared to go on at two o'clock, particularly in relation to my locations and so forth.

The Court: All right. We will recess at this time until two o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was had until 2:00 o'clock p.m. of the same day.) [237]

Los Angeles, California, Wednesday, June 4th, 1947
2:00 P. M.

The Court: You may proceed.

Mr. Painter: Call Mr. Wallace.

WILLARD W. WALLACE,

called as a witness by and on behalf of the defendants,
having been first duly sworn, was examined and testified
as follows:

The Clerk: State your full name.

The Witness: Willard W. Wallace.

Direct Examination

By Mr. Painter:

Q. Mr. Wallace, where do you reside?

A. Denver, Colorado.

Q. And you are the Willard Wallace last named as a
defendant and cross-complainant in this proceeding?

A. Yes, sir.

Q. Mr. Wallace, I am going to show you a group
of instruments, a group containing, I believe, 16 instru-
ments, and ask you if you have seen them before?

A. I have.

Q. And where the first time? A. In Denver.

Q. And who prepared the typing or dictating and
prepared the typing which appears on those instru-
ments? [238] A. I had them prepared.

Q. And are you familiar with the signatures of J. C.
Bergere, A. L. Bergere, James P. Delaney, Margaret J.
Delaney and Irvin S. Barthel and Harris Hammond?

A. I am.

Q. And are the writings on that instrument in the
handwriting of those individuals? A. It is.

(Testimony of Willard W. Wallace)

Q. Is that the handwriting of yourself, "Willard W. Wallace"? A. It is.

Q. And of your wife Edna M. Wallace?

A. It is.

Q. At the time that you prepared or had these instruments prepared, Mr. Wallace, did you prepare any other instruments? A. I did.

Q. I am showing you a weatherbeaten piece of cardboard and I will ask you if you have seen that before?

A. I have.

Q. And where? A. In Denver.

Q. Was that prepared by you or under your direction? A. It was.

Q. Were there other instruments similar in character, [239] except perhaps for some of the typed wording, prepared by you?

A. There were. There were a total of 16.

Q. After the preparation of the group of instruments which we designated as 16 instruments and the cardboard instrument which you have designated as being 16 in number, did you compare the papers, the 16 paper instruments with the 16 cardboard instruments? A. I did.

Q. And after that comparison did you find that the cardboard instruments were a true and correct copy of the paper instruments? A. I did.

Q. After the preparation of the cardboard instruments, 16 in number, were those signed by somebody?

A. They were signed by the individuals who signed the other copy.

(Testimony of Willard W. Wallace)

Q. In other words, the ones whose names you have heretofore identified? A. That is right.

Q. After the preparation of those instruments, now referring to the 32 instruments, what did you do with them?

A. I sent them to Mr. J. C. Bergere here in Los Angeles.

Mr. Painter: At this time, if your Honor please, I would [240] like to have marked for identification separately, the first 16 instruments we have referred to, the paper instruments.

The Court: They will be given letters from A to whatever the letter is.

Mr. Painter: And then following those 16 instruments I would like to have marked for identification the cardboard instrument which we referred to.

The Court: Very well.

The Clerk: The 16 instruments are marked Defendant Jose et al. Exhibit A to P, inclusive.

(The documents referred to were marked as Defendants Jose et al. Exhibits A to P, inclusive, for identification.)

The Clerk: The cardboard instrument referred to is marked Defendant Jose Exhibit Q for identification.

(The document referred to was marked as Defendant Jose Exhibit Q, for identification.)

(Testimony of Willard W. Wallace)

Q. By Mr. Painter: I am going to show you the instrument which bears the notation "Defendants Exhibit Q for identification," and ask you where you next saw this instrument after having prepared it and sent it to Mr. Bergere?

A. It was posted on a stake on one of the properties in the Imperial Valley.

Q. And when did you see that?

A. I think on one or two other occasions but definitely sometime during December, last December. [241]

Q. And did you take that from the post at that time and give it to someone? A. I did.

Q. And to whom did you give it?

A. To Mr. Howard Painter.

Mr. Painter: I am asking at this time, if your Honor please, that Exhibit Q for identification be introduced in evidence.

Mr. Hedges: To which we object on the ground there has been no showing that it was posted on the premises. The only testimony is that the witness saw it before it left his possession and then at some later date saw it on a post. There is no testimony it was signed or that the signatures appeared thereon.

Mr. Painter: It isn't for the purpose of showing posting, your Honor. I offer it in evidence just as a chain in the instruments—laying a foundation for ultimately introducing in evidence copies of that.

(Testimony of Willard W. Wallace)

Mr. Hedges: I might add further to the objection we don't know upon which location on the property or even whether it was on this property that it was posted. He said he found it on a stake in Imperial Valley.

The Court: It is an instrument which is not signed. There is no evidence of any signature attached to it.

Mr. Painter: Your Honor, I think by a very close [242] examination you will find that it is a weatherbeaten instrument from which the signatures have probably been eliminated.

The Court: No, no, I cannot say that because there is no showing. If you examine the places for signatures there is no evidence of any signature being erased by the weather. I think sufficient foundation has not been laid.

Mr. Painter: All right, sir.

The Court: If you look through a magnifying glass you will see no signatures were attached. Even the type-writing was not entirely deleted. Proceed.

Mr. Painter: Your Honor, I will withdraw the offer at this time.

The Court: It may remain Exhibit Q for identification.

Mr. Painter: And proceed with my examination. That is all, Mr. Wallace.

Mr. Hedges: No questions.

Mr. Wood: No questions.

Mr. Painter: Mr. Bergere.

J. C. BERGERE,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: J. C. Bergere. [243]

Direct Examination

By Mr. Painter:

Q. Mr. Bergere, where do you reside?

A. 220 South Weatherly Drive.

Q. Are you one of the Bergeres, the J. C. Bergere named as one of the defendants in this action and the cross-complainant?

A. Yes.

Q. I am showing you a group of instruments which have been marked Defendants' Exhibits A to P, inclusive. I will ask you to examine both the front and the back of each one of those instruments and state whether or not you have seen those instruments before?

A. I have.

Q. When was it that you saw them the first time?

A. It was—I don't know—It was in 1945, in July.

Q. And from whom did you get those instruments?

A. From Mr. Wallace in Denver, Colorado.

Q. And did you receive them through the mail?

A. Yes, sir.

Q. At the same time you received those instruments which you have just been examining, Defendants' Exhibits A to P, inclusive, did you in the same envelope received any other instruments?

A. I did. [244]

Q. And describe what those instruments looked like.

A. They were cardboard about 8 by 8.

Q. And I am showing you Defendants' Exhibit Q for identification and ask you if that instrument fairly

(Testimony of J. C. Bergere)

represents the type of the other instruments you received from Mr. Wallace through the mail? A. It does.

Q. Now, at the time that you received the instruments designated Defendants' Exhibits A to P for identification, was the front—that is, the front part of this instrument in the form that it is today? A. It was.

Mr. Hedges: Referring to Exhibit Q?

Mr. Painter: No, Exhibits A to P, inclusive.

Q. By Mr. Painter: And did it contain the signatures which now appear at the bottom of that page?

A. All but two.

Q. Now, what two instruments—what two signatures did it not contain? A. All but three.

Q. What three signatures did it not contain?

A. It did not contain Mr. Hammond's, A. L. Bergere, or mine.

Q. Are you familiar with the handwriting of Harris Hammond? [245] A. I am.

Q. And will you examine those instruments and state whether or not the signature "Harris Hammond" is in the handwriting of Harris Hammond, one of the parties to this action? A. Yes, they are.

Q. And after receipt of that instrument did you affix—or those instruments, A to P, inclusive, did you affix your signature to each one of those instruments?

A. I did.

Q. And was the signature of A. L. Bergere fixed to that instrument? A. It was.

Q. And are you familiar with the signature of A. L. Bergere? A. I am.

Q. And does his signature appear in his handwriting in each one of those instruments? A. It does.

(Testimony of J. C. Bergere)

Q. After the receipt of those instruments and the 16 instruments which I believe you have described as the cardboard instruments, did you compare the printing and typing which appeared on the face of the cardboard instruments, the 16, with the typing and the printing which appeared on the face of the instruments A to P, inclusive? [246] A. I did.

Q. And after an examination of those 32 instruments did you or did you not find that there was an instrument known as a cardboard instrument which was an exact copy of one of these instruments, A to P, inclusive?

A. Yes, they were.

Q. There was? A. Yes.

Q. Now, when you received the cardboard instruments, the 16, how many—strike that. When you received the cardboard instruments, the 16, were there any signatures on those instruments? A. There were.

Q. And how many signatures? A. Five.

Q. And will you give us the signatures which appeared on each one of those 16 cardboard instruments when you first received them?

A. Willard W. Wallace, Edna M. Wallace, James P. Delaney, Mary Jane Delaney, and Irvin S. Barthel.

Q. And after receipt of those 16 cardboard instruments did you have affixed thereto, or did you see affixed thereto, the signature of Harris Hammond?

A. I did.

Q. And was that signature of Harris Hammond on each [247] one of the 16 cardboard instruments?

A. It was.

Q. And what other signatures did you see affixed after receipt of the 16 cardboard instruments?

A. A. L. Bergere's signature and my own.

(Testimony of J. C. Bergere)

Q. That is J. C. Bergere? A. J. C. Bergere.

Q. Now, after receipt of the cardboard instruments, the 16, and after the affixing of the three other signatures on the 16 cardboard instruments, what, if anything, did you do with those 16 cardboard instruments?

A. I had these cardboard instruments tacked on pieces of board which had a stake and put them in my car to take to Imperial Valley.

Q. By that do you mean that you had a stake on which was attached a piece of board on which you attached a copy of one of the cardboard instruments?

A. That is right.

Q. And how many of those stakes did you prepare with boards attached to them?

A. I had prepared 16.

Q. And did you personally attach on each one of those boards one of the instruments we have been designating as the 16 cardboard instruments? A. I did. [248]

Q. And when you had completed doing that was there one on each of the separate 16 stakes?

A. There was.

Q. What did you do with those 16 stakes, with the 16 cardboard instruments tacked onto them after you had prepared them in that manner?

A. Put them in the back of my car and took them to Brawley.

Q. And then what did you do with them?

A. I gave them to Mr. Norris.

Q. And Mr. Norris is whom?

A. Mr. Norris is a surveyor.

Q. Give us his given name.

A. Mr. Byron Norris.

(Testimony of J. C. Bergere)

Q. Mr. Byron Norris? A. Yes.

Q. And do you remember the day of the month, the day and the month and the year it was that you turned those over to Mr. Norris' care? A. It was July 6th.

Q. July 6th? A. I mean September 6th.

Q. Now, you heretofore testified again to having received those about July 6th. Was that in error?

A. That was an error. It was— [249]

Q. It was about September 6th?

A. September 6th.

Q. And was it on the 6th of September or sometime in that neighborhood, that you received them from Mr. Wallace? A. It was the first part of September.

Q. Then you put them in the back of Mr. Norris' car on the 6th of September. Where was Mr. Norris at that time? A. At Brawley.

Q. Now, the exhibits for identification, Defendants' A to P inclusive, what did you do with those?

A. I took them to the County Recorder of Imperial Valley.

Q. And what did you do with them at that time?

A. I gave them to the County Recorder and asked to have them recorded.

Q. And on what date did you do that?

A. That was on September 7th.

Mr. Painter: That is all.

Cross Examination

By Mr. Hedges:

Q. Mr. Bergere, you testified you received from Mr. Wallace in Colorado, Defendants' Exhibits A to P, bearing five of the eight signatures that are on those documents? A. That is right.

(Testimony of J. C. Bergere)

Q. And that you in turn executed each of the documents [250] yourself and in turn either witnessed or are familiar with the signatures of Mr. Hammond and Mr.

A. L. Bergere? A. Yes, sir.

Q. Is he your brother, incidentally?

A. My brother, yes.

Q. And at the same time you received 16 other documents, being heretofore referred to as the cardboard documents. Was there one document for each on the four sections involved?

A. Well, each one of these cardboard documents matched one of these.

Q. In other words, there was one for each claim, 16 claims in all? A. That is correct.

Q. And each one of those cardboard documents was signed likewise with five signatures?

A. That is right.

Q. And you in turn executed the instrument and your brother and Mr. Hammond executed them?

A. That is right.

Q. There were no more than the 16 cardboards and no more than the 16 claims, is that correct?

A. 16 was all there were.

Q. You are positive you did not have any extra copies?

A. I didn't have any extra copies, no. [251]

Q. In other words, you are certain in your statement that there were just 32 documents in all that you received?

A. As I remember that is all there were.

Q. The only thing that you did with the instruments that you received from Mr. Wallace was to execute them yourself, see that the other two gentlemen executed them, tacked the cardboard, the 16 cardboard notices on a piece

(Testimony of J. C. Bergere)

of board which in turn was nailed to a stake; delivered those to Mr. Norris at Brawley and recorded the 16 claims, the defendants' Exhibits A to P, is that correct?

A. That is correct.

Q. You had nothing whatever to do with the transaction other than that?

A. That is right.

Q. I didn't quite understand your testimony as to when you received these instruments. Was it the first part of September or the 6th of September?

A. The first part of September.

Q. In other words, you had them in your possession several days before you took them down to Mr. Norris?

A. That is right.

Q. Did you give any instructions to Mr. Norris when you handed him these 16 cardboards tacked to the stake?

A. Yes. Mr. Norris and I went over the whole thing as to what he was to do with these stakes and I left him in [252] Brawley while I went to El Centro.

Q. But you didn't go out with Mr. Norris to the property at the time he staked the claims, if he did?

A. Not at the time he staked the claims, no.

Q. Now, you handed them to him on the 6th of September. You didn't file those instruments until the 7th, did you?

A. That is right.

Q. You took them to the Recorder's office at 10:00 a.m. on the 7th, is that correct?

A. That is correct.

Mr. Hedges: No further questions.

Mr. Wood: No questions.

The Court: Call your next witness.

Mr. Painter: Mr. Byron Norris.

BYRON NORRIS,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Byron B. Norris.

Direct Examination

By Mr. Painter:

Q. Mr. Norris, what is your profession?

A. I am a consulting engineer.

Q. And where do you reside? [253]

A. 808 Kendall Avenue, South Pasadena, California.

Q. Did you on the 6th of September 1945 received from Mr. J. C. Bergere any instruments tacked onto stakes? A. I did.

Q. And where were you when you received those?

A. In Brawley.

Q. And after the instruments were received where were they placed?

A. These cardboards were on boards with a stake and I took them and put them in my car on the 6th of September.

Q. And how many boards were there on stakes?

A. 16.

Q. The cardboard instrument similar to Defendants' Exhibit Q for identification, tacked onto each one of those boards? A. Yes.

Q. And did you examine each and every one of the instruments which was attached onto a stake at any time between the date, the 6th of September, and prior to ten o'clock the morning of the 7th of September, 1945?

(Testimony of Byron Norris)

A. Yes, at the time the stakes and this notice was transferred to my car we checked each one for the name and location.

Q. And did you have in your possession at that time a diagram or plat of the property involved in this matter? [254]

A. Yes.

Q. And do you still have that in your possession?

A. Yes.

Q. Now, referring to Defendants' Exhibit Q for identification, will you state whether or not on each one of the cardboard instruments tacked on each one of these boards, there appeared the printing which appears on Defendants' Exhibit Q for identification?

A. Yes, to the best of my recollection it was the same here except it designated the area and the name of the claim.

Q. I am asking you now just about the printing—that is, not the typing but the printing. Was the printing the same on each one of those 16 cardboards as appears on this Defendants' Exhibit Q for identification?

A. Yes.

Q. Now, from the diagram or plat which you have before you can you give us the description and the name of the claims that appeared on each one of those 16 cardboard signs which were tacked onto the boards?

A. Yes.

Q. Now, will you start in—strike that.

Mr. Painter: At this time, if the court please, I am going to ask that the instrument that the witness is looking at be marked as Defendants' Exhibit R for identification. [255]

The Court: It may be so marked.

(Testimony of Byron Norris)

(The document referred to was marked as Defendants' Exhibit R, for identification.)

Q. By Mr. Painter: Will you start in at the North-east Section of the property, the Northeast Quarter section of the property and follow a continuity by giving us the names of each individual claim, such as we have had heretofore, give us all the claims by that name before you go to another set of claims. Now, when you give us the name of the claim will you also give us the description which was contained on this cardboard at the time you saw it posted on the stakes.

A. Claim number, Plat No. 1 is the Northeast Quarter of Section 21.

Plat No. 2 is the Northwest Quarter of Section 21.

Plat No. 3 is the Southeast Quarter of Section 21.

Plat No. 4 is the Southwest Quarter of Section 21.

Gunnison No. 1 is the Northeast Quarter of Section 20.

Gunnison No. 2 is the Northwest Quarter of Section 20.

Gunnison No. 3 is the Southeast Quarter of Section 20.

Gunnison No. 4 is the Southwest Quarter of Section 20. [256]

Silver Heels No. 1 is the Northeast Quarter of Section 28.

Silver Heels No. 2 is the Northwest Quarter of Section 28.

Silver Heels No. 3 is the Southeast Quarter of Section 28.

Silver Heels No. 4 is the Southeast Quarter of Section 28.

Horse Shoe No. 1, the Northeast Quarter of Section 29.

(Testimony of Byron Norris)

Horse Shoe No. 2, the Northwest Quarter of Section 29.

Horse Shoe No. 3, the Southeast Quarter of Section 29.

Horse Shoe No. 4, the Southwest Quarter of Section 29, all in Township 14 South, Range 12 East, San Bernardino Meridian.

Q. Now, was there on one of these claims typed in the—or, rather, we will call them notices of location from now on—one of these notices of location was there typed into the instrument the word “Unorganized,” the word “Imperial,” the word “California,” and the words and number “Plat No. 1”?

A. Yes, to the best of my recollection it was.

Q. Now, in that same instrumnt was there the description typed in, “The Northeast Quarter of Section 21, Township 14, South, Range 12 East, S.B.B. & M., consisting of 160 acres”? [257]

A. Yes, I believe there was.

Q. Now, as you went through each one of these notices which were staked on the claim, did you find that there was a claim designated as Plat No. 2, Plat No. 3, Plat No. 4; Gunnison No. 1, Gunnison No. 2, Gunnison No. 3, and Gunnison No. 4? Horse Shoe No. 1, Horse Shoe No. 2, Horse Shoe No. 3, Horse Shoe No. 4, and Silver Heels, No. 1, Silver Heels No. 2, Silver Heels No. 3, and Silver Heels No. 4, typed on to the cardboard which was attached to the stake? A. Yes.

Q. And did you find in each instance that the quarter section involved in that particular claim was described?

A. Yes.

(Testimony of Byron Norris)

Q. And did it coincide with the claim name which you had placed on Defendants' Exhibit R for identification?

A. Yes, it did.

Q. By the way, did this Defendants' Exhibit R for identification—was that all prepared by you?

A. Yes.

Q. And was it prepared to be used in connection with certain matters involved in this matter? A. Yes.

Q. Now, on the instruments, the same 16 cardboard instruments, did you find a date typed in after the words "Discovered and located"? [258] A. Yes.

Q. And what was that date in each one of the instruments? A. September 7th, 1945.

Q. And did you find after examining all of the 16 instruments that the 16 instruments described 16 quarter sections of this property? A. Yes.

Q. And in each of the 16 instruments was the section and the township and the range properly set forth?

A. I believe it was, yes. We checked that and I think it was.

Q. Now, on these 16 instruments when you received them, the cardboard instruments, did you see any names on the bottom of the instruments under the words and figures "Discovered and located September 7th, 1945"?

A. Yes; to the best of my recollection there was, I think, eight signatures on there.

Q. Whose signatures they were you do not know?

A. I don't know.

(Testimony of Byron Norris)

Q. Did you know any of the signatures that were on there? Did you recognize any of the signatures?

A. I wouldn't say that I would, no. I think I would recognize Mr. Wallace's signature but other than that I don't believe I would. [259]

Q. Now, after receiving those instruments tacked onto those stakes, did you keep those in your possession from that time on until ten o'clock the morning of September 7th? A. I did.

Q. I am going to show you Defendants' Exhibits A to P, inclusive, and ask you if you have ever seen those 16 instruments before? A. No, I never have.

Q. You never have? A. No.

Q. After receiving the 16 cardboard instruments which were attached to the stakes, did you go out on the property involved in this action?

A. As of September 6th, you mean?

Q. No, at any time after receiving them from Mr. Bergere?

A. Yes, yes, on September 6th after receiving these we went out and looked the property over with the idea of locating the section corners and quarter corners.

Q. And who was with you at that time?

A. Mr. Thompson and Mr. Bergere.

Q. And describe for us just what you did after you got to the property on the 6th?

A. Well, in going out to the property I had checked it on a map and we measured off six and one-tenth miles to [260] where the corner of the Southeast corner of Section 21 would be, and we found a metallic marker there at that point.

(Testimony of Byron Norris)

Q. Now, will you step down and show us the metal marker which you found at that point, marking it with your pencil on Plaintiffs' Exhibit 1? A. Yes, sir.

Q. Now, will you place thereafter—do you have a green pencil with you? A. Yes.

Q. Will you mark at that point the letter "A." Now, that letter "A" designates the monument or Governmental monument you discovered at that time?

A. Yes, sir; it is the common corner here for 21 and 28, Sections 21 and 28.

Q. Sections 21 and 28, is that right?

A. That is right.

Mr. Hedges: Mr. Painter, pardon me for interrupting. I wonder if I might ask you to identify approximately the time he went out there on the 6th?

Q. By Mr. Painter: Tell us about the time you went out there on the 6th?

A. Well, to the best of my recollection it would be around one o'clock, I believe, that we arrived out there. Somewhere near that.

Q. And now describe for what you did after having [261] found the Government monument at the point "A"?

A. Well, we continued on here in a westerly direction and located the quarter corner here, the common quarter corner for Sections 21 and 28. At this point I proposed a stake and then we proceeded and located the corner, the common corner in the middle of the property and then proceeded to the common quarter corner for Sections 20 and 29 at this point. These two points were the points in particular I wished to locate.

(Testimony of Byron Norris)

Q. Now, will you mark with the letter "B" the second quarter corner or monument, the second one that you found, and then with the letter "C" the third monument you found. A. This one?

Q. Yes, the one in the center of the property. And with the letter "D" the fourth monument you found.

A. Yes.

Q. Now, what further did you do on that day?

A. Well, I think that is all we attempted to do that day—all that we attempted to locate that day was these monuments along this road.

Q. All right, you may take the stand again.

Did you return to the property on the morning of the 7th of September, 1945? A. Yes.

Q. About what time of the day did you arrive? [262]

A. About nine o'clock in the morning.

Q. And after arriving at the property did you drive onto it? A. Yes.

Q. And did you go to some point within the boundaries of the property on that morning? A. I did.

Q. And what point did you go to?

A. The point marked "B" on this, or the South quarter corner of Section 21.

Q. Now, did you remain at that point "B" for any period of time? A. Yes.

Q. How long?

A. Well, until ten o'clock when we started staking.

Q. Now, commencing with ten o'clock will you tell us where you first did any staking, as you call it?

A. The first staking we did was on Platte No. 3.

Q. Now, will you describe that by legal description?

A. That is the Southeast Quarter of Section 21.

(Testimony of Byron Norris)

Q. Now, before you describe for us what you did out there in staking, will you give us the procedure you followed from the time that you got out of the car and removed your stakes with the claims on them until you got onto the property and what you did after you got onto this partic-[263] ular property?

A. Well, we drove down to this monument that we had located the day before, and waited there, prepared to be ready to stake it at exactly ten o'clock. We took our stakes out and checked the names and numbers and was prepared to go ahead at ten o'clock.

Q. Now, at ten o'clock did you take one of the stakes and go over to the property which you have described as Platte No. 1?

A. No. I think you should refer to Platte 3.

Q. Platte 3, I should say. A. Yes.

Q. Before going to Platte 3 did you examine the cardboard sign that was on that stake to determine whether or not that was the Platte 3 notice of location?

A. Yes, sir.

Q. And did you find it to be the proper notice of location? A. Yes.

Q. And did you find thereon the legal description of that particular quarter section? A. Yes.

Q. And did you find thereon the eight names which you have heretofore testified to? A. Yes. [264]

Q. And what did you do after you had done that?

A. After we staked Platte 3?

Q. You went over and did something with the stake, didn't you?

A. Yes. We put the stake down at exactly ten o'clock.

(Testimony of Byron Norris)

Q. Exactly ten o'clock? A. Yes.

Q. Did you make any field notes while you were doing this? A. Yes.

Q. And do you have those field notes with you?

A. Yes, I do.

Q. Will you get them so you can have them while you are working with this matter? A. Yes.

Q. Now, to what quarter section did you next go?

A. To Silver Heels No. 1, the Northeast Quarter of Section 28.

Q. Now, did you take a notice of location with you to that location? A. Yes.

Q. To that quarter section? A. Yes.

Q. Before staking or driving the stake in the ground [265] did you examine the notice of location which was posted on that board? A. Yes.

Q. And did you find that it described the property which you are designating as Silver Heels No. 1?

A. Yes, sir.

Q. And did that likewise contain the eight signatures which you have heretofore mentioned? A. Yes.

Q. And did it likewise contain this other printing and typewriting which you have heretofore testified to?

A. Yes.

Q. In other words, as you examined each and every one of these claims, notices of location, Mr. Norris, preparatory to posting the notice of location, did you find any change in the appearance of those notices of location in any manner than what it had been on the day before when you examined it? In other words, were they the same as when you examined them the day before—posted on the board? A. You mean a change in this?

(Testimony of Byron Norris)

Q. Had there been any change made in them as they appeared the day before? A. No, no, I believe not.

Q. Now, would you tell me to what quarter section you next went after finishing the Silver Heels No. 1? [266]

A. Went to Platte No. 4, which is the Southwest Quarter of Section 21.

Q. And what did you do when you got there?

A. We posted our notice.

Q. You drove it in the ground, the stake?

A. Yes, sir.

Q. By the way, how far above the ground did these stakes protrude after you had driven them in?

A. I would say an average of about four feet. They were about five feet long or possibly a little more.

Q. By the way, counsel has brought to my attention that I didn't ask you the time at which you posted the notice on Silver Heels No. 1. Can you give that to us?

A. Yes; 10:02 a.m.

Q. And now before you posted the notice of location on Platte 4, did you examine the notice to see whether or not it contained the description of the quarter section designated as Platte 4? A. I did.

Q. And did it? A. Yes.

Q. Now, what time of the day did you drive that stake in the ground? A. At 10:05 a.m.

Q. And then where did you go? [267]

A. I crossed the road to Silver Heels No. 2, which is the Northwest one-quarter corner of Section 28.

Q. And what did you do after you got over there?

A. We posted our notice there at 10:10 a.m.

(Testimony of Byron Norris)

Q. In each instance where you say you posted your notice do you mean by that, Mr. Norris, that you drove the stake in the ground? A. Yes.

Q. And that on the stake was one of these cardboard notices? A. Yes.

Mr. Hedges: Mr. Painter, I didn't get the name of the last claim. Was that Silver Heels No. 2?

Mr. Painter: Silver Heels No. 2.

Q. By Mr. Painter: And at what time of the day did you drive that stake in the ground?

A. Silver Heels No. 2 at 10:10 a.m.

Q. I don't know whether I asked this question but for fear I didn't, the description which you found on the Silver Heels No. 2 notice of location was the description of that particular quarter section, was it not? A. Yes.

Q. Now, after you had posted your notice on Silver Heels No. 2 what did you do?

A. We took a picture of it as best we could, of the [268] posting at that corner.

Q. And then what did you do?

A. We drove west one mile to the common quarter corner between Sections 20 and 29.

Q. And that is the point which you marked on Plaintiffs' Exhibit 1 as "D," is that correct? A. Yes.

Q. Now, when you got over there what did you do and what did Mr. Thompson do?

A. We proceeded to stake that corner as fast as we could.

Q. Well, will you tell us whether or not you took out of your car any additional stakes with cardboard signs on them? A. Yes.

(Testimony of Byron Norris)

Q. How many?

A. Took out the four stakes, Gunnison Nos. 3 and 4, and Horse Shoe Nos. 1 and 2.

Q. Now, to which quarter section did you first go?

A. First went to Horse Shoe No. 1, which is the Northeast Quarter of Section 29.

Q. And before driving that stake into the ground did you examine the notice of location which was on the stake?

A. Yes.

Q. To determine whether or not that particular quarter [269] section was properly described in that notice of location?

A. Yes.

Q. And was it?

A. Yes.

Q. At what time of the day did you drive the stake at that location?

A. At 10:22 a.m.

Q. Now, after having driven that stake into the ground where did you go?

A. Crossed the road to Gunnison No. 3, which is the Southeast Quarter of Section 20.

Q. And what did you do over there?

A. We posted the notice at 10:24.

Q. 10:24 a.m.?

A. Yes.

Q. And prior to the time you posted the notice did you examine the notice of location to see whether the description which was contained on that notice of location was the description for that particular quarter section involved?

A. Yes.

Q. And was it?

A. Yes.

Q. Next, where did you go?

A. To Gunnison No. 4, which is the Southeast Quarter [270] Section of Section 20.

(Testimony of Byron Norris)

Q. And what did you do when you got there?

A. We posted that at 10:26 a.m.

Q. And before driving the post into the ground did you examine the notice to whether or not the notice which was on that sign or on that stake was properly described—properly described the quarter section involved?

A. Yes.

Q. And did it? A. Yes.

Q. Then where did you go?

A. South across the road to Horse Shoe No. 2, which is the Northwest one-quarter of Section 29.

Q. And what did you do when you got over there?

A. We staked that at 10:30 a.m.

Q. Prior to the time you staked that did you examine the notice of location which was on the board to determine whether the description correctly described the quarter section therein involved?

A. Yes, I did.

Q. Did it? A. It did.

Q. Did you give me the time at which that posting was made?

A. At 10:30 a.m. [271]

Q. Now, on each one of the notices of location did you find the same eight names which had appeared on those notices of location the day before—that is, these first eight that you have referred to?

A. Well, that was the same thing I had the day before.

Q. The same thing you had the day before?

A. Yes.

Q. And you had completed your work on Horse Shoe 2. Then where did you go?

A. Well, immediately we completed these four we took a picture of that also to show the work done there.

(Testimony of Byron Norris)

Q. The work done? A. Yes.

Q. And then where did you go?

A. I took the stakes for Gunnison No. 1 and No. 2 and walked north to post them.

Q. And where did Mr. Thompson go?

A. Mr. Thompson accompanied me that day and assisted me in posting all the first eight postings that we have just mentioned. He stayed at the car while I went to post the Gunnison No. 1 and No. 2.

Q. All right. Now, when you got up to the Northeast Quarter of Section 20 what did you do?

A. I posted a notice there on Gunnison No. 1 at 11:10 a.m. [272]

Q. And did you examine the notice to determine whether or not it contained a description of the quarter section involved? A. Yes.

Q. And did it contain the description of that quarter section? A. It did.

Q. You drove the stake into the ground the same way as in the preceding eight claims, is that correct?

A. Yes, sir.

Mr. Wood: May I have the time?

Mr. Hedges: 11:10 a.m.

Q. By Mr. Painter: Then were did you go?

A. Over to the Gunnison No. 2 claim, which is the Northeast Quarter of Section 20 and I posted that at 11:20 a.m.

Q. Prior to the time that you put that stake in on the Northwest Quarter of Section 20 did you examine the board and the sign on it to determine whether the description contained in that notice of location was the description of that quarter section involved? A. I did.

(Testimony of Byron Norris)

Q. And was it? A. It was.

Q. And again I may be repetitious, Mr. Norris, but [273] were the two notices of location which you posted on Gunnison 1 and Gunnison 2 the same two notices which you had examined the day before? A. Yes.

Q. Referring to those claims? A. Yes.

Q. Then what did you do?

A. I came back to the car and Mr. Thompson posted the southerly four claims, Silver Heels 3 and 4, and Horse Shoe 3 and 4.

Q. Then what did you do while he was doing that?

A. I stayed there at the car.

Q. And did you remain there at the car until he returned? A. Yes.

Q. And then where did you and Mr. Thompson go?

A. We drove east to the common quarter corner between Sections 21 and 28.

Q. At the point which you have marked on Plaintiffs' Exhibit 1 as Point "B"? A. Yes.

Q. And what did you do when you arrived at that point?

A. Then I took the stakes for Platte No. 1 and Platte No. 2 and walked north to post them.

Q. And when you got to the Northeast Quarter of [274] Section 21 what did you do?

A. That is Platte No. 1, the Northeast Quarter of Section 21, and I posted that at 2:45 p.m.

Q. And did you examine the notice on that occasion to determine whether or not it described the quarter section there involved? A. Yes.

Q. And did it? A. It did.

(Testimony of Byron Norris)

Q. And then where did you go?

A. To Platte No. 2, which is the Northwest Quarter of Section 21. I posted that at 2:50 p.m.

Q. And did you examine the notice of location prior to the time you posted it to determine whether or not the notice of location contained the description of that quarter section involved? A. I did.

Q. And were these two notices the same two notices which you had examined on the stakes the day before?

A. Yes. Those stakes, I might add, were in my possession all the time from the time—

Q. From the time he turned them over to you, is that right? A. Yes.

Q. After you had posted the notice of location on [275] Platte No. 2 where did you go?

A. We went back to Brawley. That finished our postings.

Mr. Painter: That is all with Mr. Norris.

Cross-Examination

By Mr. Hedges:

Q. Mr. Norris, you testified that on September 6th when these 16 claims and 16 notices were handed to you, that Mr. Bergere and Mr. Thompson—incidentally, what is this Mr. Thompson's first name?

A. I believe it is Herbert C. Thompson.

Q. You testified, I believe, that the three of you went out to the property. Is that correct?

A. That is right, yes.

Q. All you did on that occasion was to locate the quarter sections along the highway?

A. That is right.

(Testimony of Byron Norris)

Q. You didn't bother with any general land office survey stakes on any other portion of the property?

A. No.

Q. How long were you out on the property on the 6th?

A. Oh, I would say two or three hours. Something like that. I didn't keep any record of it.

Q. Did you keep any field notes that day as to what you did? [276]

A. No. We simply went out to locate those monuments.

Q. You said that on September 7th you went onto the property at about eight o'clock in the morning?

A. No. I think I arrived there about eight o'clock in the morning.

Q. How did you get out to the property?

A. I drove out in my car.

Q. What kind of car is it? A. Plymouth.

Q. Plymouth? A. Yes.

Q. What color is it?

A. I believe they call it aqua-marine blue but I call it green.

Q. And when you arrived on the property just where did you park your car?

A. At the south quarter corner of Section 21, at the point marked "B" on that exhibit.

Q. At the end of the first quarter section, is that right? A. Yes, that is right.

Q. Did you see anyone else on the property at that time?

A. At the time we arrived I did not see anyone else, no. [277]

(Testimony of Byron Norris)

Q. Did you stay in one position from nine o'clock until ten o'clock? A. Yes.

Q. Or did you move the car from place to place?

A. No. We stayed right there.

Q. Just stayed right there? A. Yes.

Q. You didn't see anyone go up and down the highway or any other cars on the highway, is that correct?

A. Well, there were cars came later, yes.

Q. I mean, when you got there?

A. Not at the time I arrived, no. I could see no cars.

Q. And you can see some distance on that road, can you not?

A. You can to the east but to the west there is a hill there. You couldn't see very far.

Q. Which way was your car parked? Toward the west? A. Yes.

Q. Did you see anyone else out on the property when you were out there on the 6th? A. Yes.

Q. Were they there before you got there or did they arrive afterwards?

A. No. They were out there when we arrived. [278]

Q. Could you identify anyone that was there?

A. I don't believe I could.

Q. Do you know Mr. Lewis when you see him?

A. I didn't know him at that time. In fact, I didn't know him until yesterday.

Q. Did you see him out there on the 6th?

A. I don't recall that I did.

Q. You wouldn't remember one way or the other?

A. No. I don't think I would. I paid no particular attention.

(Testimony of Byron Norris)

Q. Did you notice him out there on the 7th?

A. There was quite a group of men there. Whether or not he was among them I wouldn't be certain.

Q. But they were not on the property, according to your testimony, when you arrived, is that right?

A. On September 7th at nine o'clock I didn't see any of them. There were two cars drove up a little bit later.

Q. Could you identify those cars?

A. Yes. One of them was an Army car, a command car, I believe they call it, sort of an exalted jeep. And the other was a grey sedan. I don't know what make.

Q. Do you recall what time it was when you first saw them?

A. To the best of my recollection it was between 9:30 and ten when they drove up. They were not together if I [279] recall right. First one drove up and then the other.

Q. Mr. Bergere was not with you on the 7th, was he?

A. No.

Q. Just Mr. Thompson and yourself? A. Yes.

Q. Mr. Norris, will you take the green pencil that you used a few moments ago and step down to the map and show me on the map by indicating with figures 1 in order, where you posted the first claim which you said was Platte No. 3, the Southwest Quarter of Section 21?

A. Well, it would be approximately at this point here. I will make a "T" there for a posting.

Q. Put the figure 1 with it so we can follow one right after the other, will you, please? A. All right.

Q. You said that was at ten o'clock? A. Yes.

Q. Incidentally, how do you know it was ten o'clock?

A. Well, because I timed it.

(Testimony of Byron Norris)

Q. Did you make a record of the time at that time?

A. Yes; and checked it.

Q. Do you have that record with you? A. Yes.

Q. Is that the little slip of paper that I saw a moment ago? [280] A. That is right.

Q. This instrument I am now showing you in your own handwriting? A. Yes.

Q. What date was it made out?

A. September 7th, 1945.

Q. And was it made as you progressed?

A. Yes.

Q. All right. Will you show us the next point that you went to which I believe you said was Silver Heels No. 1, and show me the route that you took?

A. Well, we crossed the road to the south and posted at approximately this point here.

Q. Indicating the figure 2 on the map. And then you said you went next to Platte No. 4, which is in the Southwest Quarter of Section 21? A. Yes.

Q. You walked to those three points, I assume, that you have indicated so far?

A. Yes; I would say we ran.

Q. You have indicated this last point on the map as "T-3"? A. Yes.

Q. Now, when you say "we did" both you and Mr. Thompson ran? [281] A. Yes, sir.

Q. Both of you?

A. Yes; we were working together.

Q. All right. You were both staking the same locations? A. Yes.

(Testimony of Byron Norris)

Q. How did you both do that? Did one hold the stake and the other hold the hammer? What are the physical facts?

A. Yes; one would hold the stake and the other drive it in.

Q. How far did you drive these in?

A. Oh, I would say about a foot—maybe a little more.

Q. All right. Then where did you go next?

A. Crossed the road here.

Q. Indicating T-4 on the map? A. Yes.

Q. Your first posting on the Northeast Quarter of 28 was 10:00 o'clock or 10:02?

A. Northeast Quarter of 28? That was ten.

Q. I beg your pardon, I meant the Southwest Quarter of 21. A. Yes, that was at ten o'clock.

Q. In other words, in ten minutes you posted four claims? A. Yes. [282]

Q. All right. Then you say you took a picture of the four postings, or what did you do?

A. As near as I could, yes.

Q. You mean you took four pictures?

A. No, I took one picture from approximately this position here.

Q. Do you have that picture?

A. I believe counsel has it.

Q. Very well.

Mr. Painter: Would you like it, Mr. Hedges?

Mr. Hedges: Yes.

Mr. Painter: It is marked on the back.

Mr. Hedges: It isn't marked on the back.

(Testimony of Byron Norris)

Q. By Mr. Painter: Is it one of those?

A. Yes; it is that picture there. I think I took two exposures. This is the same picture only I believe a different exposure.

Mr. Hedges: May I have this marked for identification?

Mr. Painter: That is all right.

Mr. Hedges: I would like to have these two photographs marked for identification as one exhibit.

The Court: Very well.

The Clerk: Plaintiffs' Exhibit 50 for identification.

(The documents referred to were marked Plaintiffs' Exhibit 50, for identification.) [283]

Q. By Mr. Hedges: I hand you Plaintiffs' Exhibit 50 for identification and ask you to point out to me there where the four locations are which you have indicated?

A. There is one posting. Here is another. There is another right there.

Q. I can see three. I wondered where the fourth one was.

A. I believe it is right in there. I believe that is right there but I wouldn't be positive.

Q. The second one you are referring to. There only appears to be two visible that I see.

A. On this side.

Q. One here and one there? A. Yes.

Q. Now, after you took a picture of that quarter corner where did you go next?

A. We drove west to this south quarter corner of Section 20, marked "D" on this exhibit.

(Testimony of Byron Norris)

Q. All right. And you posted what you said was Horse Shoe No. 1, the Northwest Quarter of Section 29. Will you indicate where you posted that, please?

A. Right here.

Q. All right. And where did you make the next posting that is indicated as No. 5—that is No. 5, Mr. Reporter—"T-5." [284]

A. On Gunnison No. 3, which is the Southeast Quarter of Section 20. Marked that "T-6."

Q. And where next?

A. On Gunnison No. 4, which is the Southwest Quarter of Section 20. I marked that "T-7."

Q. And the next one?

A. Horse Shoe No. 2, which is the Northwest one-quarter of Section 29. I will mark that "T-8."

Q. Now, did you park your car at that quarter section and both you and Mr. Thompson again run to these various locations? A. Yes, sir.

Q. And you posted them in the order indicated?

A. Yes.

Q. And then you took a picture of this quarter corner, is that right?

A. Yes. That picture can be very readily identified on account of this prominent hump. It is the only one along the road there that is on the property that I know of.

Q. Let us mark these two pictures in connection with this.

A. Yes, the same pictures, just different exposures.

Q. If they are alike we only need one.

Mr. Hedges: May this be marked Plaintiffs' next in order? [285]

(Testimony of Byron Norris)

The Court: Yes.

The Clerk: Plaintiffs' Exhibit 51 for identification.

(The documents referred to were marked as Plaintiffs' Exhibit 51, for identification.)

The Court: I only see one posting in Exhibit 50.

Mr. Hedges: That is all I can find.

The Witness: Your Honor, it was a poor day to take a picture.

The Court: This one you can see two. One is right behind the other. Is that it?

The Witness: Yes.

Q. By Mr. Hedges: Did you take these pictures, Mr. Norris, or did Mr. Thompson take them?

A. I took them.

Q. The gentleman in the picture, I assume, is Mr. Thompson, is that correct?

The Court: There are four visible on Exhibit 51.

The Witness: I am not sure. Maybe Thompson did take some of those.

The Court: But I can't see but three here.

The Witness: I know I took some of them. It is possible he might have taken some.

The Court: There are four on that, but I see only three on this one. The one to your left is very visible with the naked eye. On this one I can see two, one behind the other, [286] but this one I can only see three. Where do you see the fourth one?

The Witness: I don't, your Honor. I think the car may be hiding it. I can't find it.

The Court: Possibly it is hidden by the car. Is there anything further?

(Testimony of Byron Norris)

Mr. Hedges: Yes, your Honor, I have some more questions.

The Court: I was going to give you a recess.

Mr. Hedges: Fine; I have quite a few more questions.

The Court: Then let us have a short recess.

(Short recess.)

The Court: You may proceed.

Q. By Mr. Hedges: Mr. Norris, do you recall how hot it was on the 7th of September out there in the midst of the desert?

A. No, sir; I do not know, but at the Brawley Hotel it was 120 in the shade.

Q. Undoubtedly it was hotter out where you were than it was in Brawley, is that right?

A. Yes, but on September 7th there was quite a nice breeze so it wasn't unbearable.

Q. Wasn't it the usual nice hot breeze?

A. Yes, it was pretty warm.

Q. Now, I think we finished before recess with the pictures. You then testified, I believe, that you went to [287] Gunnison No. 1, which is located on the Northeast Quarter of Section 20. Will you point out just where you posted the notice there and just how you got to that location?

A. Well, we went from this—

Q. You finished up at the location marked "T-8" on the map? A. Yes.

Q. Then will you indicate just the direction that you took after that to arrive at the Northeast Quarter section 20? A. Went due north here.

(Testimony of Byron Norris)

Q. Right straight up the section line, the quarter section? A. Went up the center of the section.

Q. Where did you post the notice?

A. On Gunnison No. 1, which is the Northeast Quarter of Section 20.

Q. Will you mark that T-9? A. Yes.

Q. Did you drive or did you walk?

A. I walked.

Q. And you walked alone while Mr. Thompson stayed in the car? A. Yes.

Q. You had no witnesses with you at that time?

A. No. [288]

Q. All right. Then where did you go from the point T-9 on the map to the posting of the next location which I believe you said was Gunnison No. 2, in the Northwest Quarter of Section 20?

A. This point here I will designate as T-10.

Q. Directly across the quarter section line, is that right? A. Yes.

Q. And I believe you testified that you posted Gunnison No. 1 at 11:10? A. Yes.

Q. And Gunnison No. 2 at 11:20? A. Yes.

Q. In other words, the operation took ten minutes between the two postings? A. Yes.

Q. All right. Then you came back to the car?

A. Yes.

Q. And what did you do then?

A. I waited until Mr. Thompson did his posting.

Q. Did you see him do his posting?

A. I could see him part of the time—not all the time, no.

Q. Well, when you testified that he then posted Silver Heels 3 and 4 and Horse Shoe 3 and 4 you base that

(Testimony of Byron Norris)

statement [289] on the fact that he probably told you what he was going to do?

A. Well, he took those stakes out and drove them.

Q. Did you see him drive the stakes?

A. Not all of them, no.

Q. What you mean is that he took the four stakes for those four locations with him? A. Yes.

Q. And then you didn't see him again until he came back?

A. Well, you could see him part of the time. It is rolling country there.

Q. I see, but you could not tell from where you were sitting what quarter section he was posting, could you?

A. Not very well, no. I wouldn't attempt to say.

Q. Then how long was he gone?

A. Well, he posted Silver Heels 1 and 2 first.

Q. Are you testifying from what you actually know or what you believe?

A. I know that because he took those two first out with him.

Q. Well, how long after—how much of an interval was he gone while you were sitting there waiting in the car?

A. I didn't notice when he came back to the car but it would be sometime after 12:20. I would say around, [290] possibly, 1:00 o'clock.

Q. All right, then, what did you do and Mr. Thompson do between one o'clock and the time you made the next posting, which you said was Platte No. 1 on the North-east Quarter of Section 21?

A. Well, he posted Horse Shoe 3 and 4 at 1:45.

(Testimony of Byron Norris)

Q. After he came back?

A. He came back and got the stakes from the car and then went over and posted them.

Q. Oh, I misunderstood you. I thought you said he took the postings for Silver Heels 3 and 4 and Horse Shoe 3 and 4 with him when he left?

A. No, I am sorry—just the two stakes at a time.

Q. And at approximately 1:00 o'clock, according to your best recollection, he came back and he then took the postings for Horse Shoe 3 and 4? A. Yes.

Q. And you still remained in the car? A. Yes.

Q. And when did he come back from posting 3 and 4?

A. Oh, I would say it was shortly after two—possibly 2:10. He got back in a hurry.

Q. Then from 11:20, from the time you posted the Gunnison No. 2 until 2:45 when you posted Platte No. 1, you were sitting in the car all the time, is that right?

A. No, no, I waited until he got back and then we [291] drove this mile east to the South quarter corner of Section 21 and I took the two stakes for Platte 1 and Platte 2 and walked out there and posted them.

Q. While he was doing what?

A. He stayed at the car at that time.

Q. Well, I don't quite follow you. At 11:20 you posted Gunnison No. 2 and Mr. Thompson then took the stakes and the postings for Silver Heels 3 and 4?

A. Yes.

Q. And he returned, you said, about one o'clock and he then took out the postings for Horse Shoe 3 and 4, is that right? A. That is right.

Q. And what time did he come back from that? About two, I believe you said?

A. Shortly after two, yes.

(Testimony of Byron Norris)

Q. And was it then that you drove to the Northeast Quarter of Section 21?

A. Northeast Quarter? No. The south quarter, corner of Section 21.

Q. Your next posting was Platte No. 1 on the northeast quarter section, Section 21?

A. I had to walk from the road here up to the center of the section. My car would not go over the road.

Q. In other words, you had to walk from any point that [292] you went to that wasn't on the road itself?

A. That is right.

Q. You were up here at this point, T-10 on the map, at 11:20, that is correct, isn't it?

A. Yes, sir.

Q. You walked up the center section line of Section 20 and I assume you walked back the center section line to where your car was?

A. Yes.

Q. And you waited there until Mr. Thompson returned?

A. Yes, sir.

Q. And then Mr. Thompson and yourself in your car drove in an easterly direction down the highway, is that right?

A. That is right.

Q. And where did you park your car?

A. At the south quarter corner of Section 21 at the point marked "B" on this exhibit.

Q. And what did you do then?

A. I took the postings for Platte 1 and 2 and posted them.

Q. You walked up then the center line of Section 21?

A. Yes, sir.

Q. A distance of what? A half mile?

A. Half mile. [293]

(Testimony of Byron Norris)

Q. And at 2:45 you posted Platte No. 1 claim, the Northeast Quarter of Section 21. Will you indicate where you posted that? A. That?

Q. Yes. A. That will be T-11?

Q. Yes. And what did you do then?

A. I walked due west and posted Platte No. 2.

Q. Let us indicate that on the map by a T-12. That I believe you said, was at 2:50 p.m.? A. Yes, sir.

Q. Then what did you do then?

A. Walked back to the car.

Q. Walked back down the center section line of 21 to the automobile? A. Yes, sir.

Q. And was Mr. Thompson in the car then?

A. Yes.

Q. All right. You may take the stand again. This terrain that you walked over while you were making the postings that were not on the highway was pretty rough terrain, was it not?

A. No, I wouldn't say it was rough terrain. There was one bad wash there.

Q. A sandy soil and up and down, isn't it? [294]

A. No steep hills or anything like that.

Q. Covered with a certain amount of brush?

A. Yes.

Q. Now, when you returned at 2:50 and found Mr. Thompson in the car what did you two gentlemen do then?

A. We drove back to Brawley. That completed our work.

Q. Back to what—was it the Planters Hotel?

A. I believe it was, yes.

(Testimony of Byron Norris)

Q. Now, did you do anything else with respect to these claims or the posting of them on the 7th of September?

A. No, no more than I have described here.

Q. In other words, you were finished for the day when you got back to the Planters Hotel?

A. That is right.

Q. And was Mr. Thompson with you at the Planters Hotel? A. Yes, sir.

Q. So far as you know did he do anything further on it?

A. I think he did not because he came home with me that evening. We drove home.

Mr. Hedges: Very well, no further questions.

The Court: Any redirect examination? Step down. Call your next witness.

Mr. Painter: Mr. Thompson. [295]

HERBERT C. THOMPSON,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Herbert C. Thompson.

Direct Examination

By Mr. Painter:

Q. Mr. Thompson, where do you reside?

A. 2171 Gail Street, Long Beach.

Q. And on the 6th and 7th of September, 1945, were you in the town of Brawley with Mr. Norris, the witness who just testified? A. Yes, sir.

(Testimony of Herbert C. Thompson)

Q. On the 7th of September, 1945, did you go out to the property involved in this action?

A. What date was that?

Q. The 7th of September, 1945? A. Yes.

Q. And with whom did you go out to the property?

A. Well, on the 7th I went out with the engineer, Mr. Norris.

Q. And after you arrived at the property where was the first point that you and Mr. Norris stopped? Will you step down from the stand, Mr. Thompson, and look at Plaintiffs' Exhibit 1 and point out to me the point where [296] you first stopped, bearing in mind that this is the easterly portion of the property and this is the westerly portion?

A. Yes. Those names confuse me there.

Q. Just point it out to us. A. Silver Heels—

Q. Will you point it out to us?

A. Yes, Section 21, right here.

Q. You are pointing to the point that is marked "B," is that correct? A. Yes.

Q. Now, did you at that time assist Mr. Norris and post some notices of locations at points in the neighborhood of point "B"?

A. Well, at ten o'clock we did that.

Q. Commencing at ten o'clock, is that correct?

A. Correct.

Q. And how many of those notices did you post?

A. Four.

Q. Or assist in posting? A. Four.

Q. After you had finished the posting of those notices to what point did you and Mr. Norris drive?

A. West to here.

(Testimony of Herbert C. Thompson)

Q. And you are pointing to the point on Plaintiffs' Exhibit 1 marked "D," is that correct? [297]

A. Correct.

Q. Now, while you were at point "D" did you assist Mr. Norris in posting any notices of location at or about point "D"?

A. Yes, we posted four of them. He held them and I drove the stakes.

Q. Now, after you had completed the posting of those four notices where did you and Mr. Norris go—where did Mr. Norris go? A. He went north.

Q. And what did he carry with him when he went north?

A. He carried No. 1 and 2 Gunnison and posted them.

Q. You saw those two notices of location before he left, did you? A. Yes.

Q. Now, after Mr. Norris had returned from the north what did you do?

A. I went to the—I took the two notices for Silver Heels and took them over to the locations and staked them out.

Q. Now, you say the two Silver Heels, being Defendants' Exhibit R for identification, give me the numbers of the two Silver Heels notices of location which you took with you? A. No. 1.

Q. No, look at your thing first, please. [298]

A. Oh, pardon me, it was No. 3 and 4.

Q. Now, when you took those two notices, that is the Silver Heels 3 and the Silver Heels 4 notices, did you examine them to determine whether or not those notices contained a description of the quarter sections involved?

A. We did.

(Testimony of Herbert C. Thompson)

Q. And did the one which was designated as Silver Heels No. 3 describe the quarter section involved in Section 28? A. Yes.

Q. And did the one which bore the designation of Silver Heels No. 4 have the description of the quarter section involved in Section 28? A. Yes.

Q. After you got down to the claim known as Silver Heels 3, will you describe for us what you did? You can take the stand again, Mr. Norris. Will you describe what you did with the stake and the board that was attached to it and the notice of location which was attached to that? What did you do with it? Just describe it.

A. I drove them into the ground and built a monument around each one out there.

Q. By "a monument" what did you use?

A. The rocks—boulders there.

Q. Now, about what time of the day was it that you put the notice of location on Silver Heels No. 3? [299]

A. At noon, twelve o'clock.

Q. And then where did you go?

A. Then I located the No. 4 Silver Heels.

Q. And what did you do when you got over onto the claim known as Silver Heels No. 4?

A. Well, I drove a stake and built another monument.

Q. And was it the same type of monument? You mean you used rocks? Was it the same type of monument you used on the other claim? A. Yes.

Q. Built rocks up around it?

A. Yes. It is just the customary monument.

Q. Around the base of the stake? A. Yes, sir.

(Testimony of Herbert C. Thompson)

Q. Now, after you had done that what did you do?

A. Well, I hightailed it on back to the car and got the other two location notices on the boards for the Horse Shoe No. 3 and 4.

Q. And then after getting the notices for Horse Shoe No. 3 and 4 what did you do?

A. Came on back and I located No. 3 in the—that would be the Southeast Quarter of 29.

Q. And what did you do after you had located the Southeast Quarter of Section 29?

A. Well, I drove the stake and built the monument.
[300]

Q. About what time of the day was it you did that?

A. Well, that was around about 1:45.

Q. And then where did you go?

A. I went over on the other location, which is Horse Shoe No. 4, in the Southwest Quarter of 29 and proceeded to drive the stake and build a monument.

Q. About what time of the day was it that you drove your stake on the claim designated as Horse Shoe No. 4?

A. 2:00 p.m.

Q. Now, I didn't ask you about the time of day that you drove the stake and posted the notice on Silver Heels No. 4. I believe you testified that Silver Heels No. 3 was about noon?

A. Yes.

Q. How long after noon was it that you posted and drove the stake in the ground on Silver Heels No. 4?

A. About 20 minutes.

Q. In other words, 20 minutes after 12?

A. Yes, sir.

(Testimony of Herbert C. Thompson)

Q. And after you had finished over on Horse Shoe No. 4 what time of the day was it?

A. Well, it was about 12:20.

Q. No, I am talking about Horse Shoe No. 4.

A. Horse Shoe No. 4? 12:20 is when I posted it.

Q. No, will you look at Horse Shoe No. 4, please,
[301] Mr. Thompson?

A. Oh, wait a minute. It was a little after two.

Q. And then where did you go?

A. Went back to the car.

Q. Now, when you got back to the car did you give Mr. Norris any information as to the time that you had posted these four claims?

Mr. Hedges: We object to that as being hearsay as to the plaintiff, if your Honor please, the information he gave to the other witness, Norris, outside of the presence of the plaintiff.

The Court: It would be hearsay unless Mr. Norris actually saw what he did.

The Witness: All notes that I made—I made notes and checked and checked and double checked everything that we did.

The Court: You yourself put down the date and time?

The Witness: Yes; in my field notes, and I gave them to Mr. Norris. He is the engineer.

Q. By Mr. Painter: Now, after you had returned, after you had finished at Horse Shoe No. 4 and had returned—did you say you returned to the point known as Point “D”? I don’t know whether you said so or not. Was that the point where Mr. Norris was waiting for you? A. Yes, that would be right here. [302]

Q. Look over at this map. I am pointing to “D.”

A. It is between 20 and 29.

(Testimony of Herbert C. Thompson)

Q. And after you had arrived back at that point what did you and Mr. Norris do?

A. We went back on the road. The road is on the line between the two.

Q. And to what point in the property did you return, again referring to this map?

A. To the north—you see to the north is Platte 3 and 4 and he went north there and—

Q. Will you look at the map, Mr. Thompson? Was the point that you returned to anywhere near point "B"? The first place you stopped? You remember where you stopped the first place in the morning? A. Yes.

Q. Was it anywhere near that point that you returned after leaving point "D"?

A. It was at that point and then he took the locations north.

Q. And which locations did he take and go north with?

A. Platte 1 and 2, as I remember it.

Q. And did he later return to the car? A. Yes.

Q. And then where did you go? [303]

A. Went on back to Brawley.

Mr. Hedges: Back for a Coca Cola?

The Witness: Went back to the air-conditioned hotel.

Mr. Painter: That is all.

Cross-Examination

By Mr. Hedges:

Q. What did you do with Mr. Norris on September 6th, if anything, at this location?

A. Mr. Norris and—we drove out to sort of get a line on the contour of the country and to locate the Government monuments so we would know where to start to work the next day.

(Testimony of Herbert C. Thompson)

Q. Just the two of you on the 6th, or was someone else there? A. No; Mr. Bergere was along.

Q. What did you do? Just drive along the highway that intersects the property where I am indicating on the map? A. Yes, sir.

Q. Did you get out of the car at all on that day?

A. Yes, to check the monuments. The monuments are off the road. They are not on the road.

Q. All three of you got out of the car?

A. Yes, and we all checked.

Q. Did you see anyone else on the property when you [304] drove out there on September 6th?

A. Only some fellows stuck in the sand. I don't know who they were. We asked them if they wanted us to help them. They were just about getting out. I wouldn't know them if I saw them now.

Q. You mean on the highway?

A. Off the highway in one of the gulleys.

Q. On this property?

A. I think it was before we come to No. 1 monument there—they were out there. They were just barely on the property.

Q. What time of the day was it when you were out there on the 6th?

A. It was in the afternoon. I don't remember just what hour.

Q. Early afternoon or late afternoon?

A. Well, it was about, around, between two and three, I judge.

Q. I forgot to ask you, Mr. Thompson, what is your business?

A. Well, I am sort of an assistant engineer to the engineer-geologist, scouting land leases.

(Testimony of Herbert C. Thompson)

Q. Was that your occupation on the 6th of September, 1945? A. Yes, that is right. [305]

Q. Now, will you tell us on the map, or show us on the map the location of the posting that you made on Silver Heels No. 3 on September 7th, 1945? Is the green pencil still available?

Mr. Painter: I will get it.

Q. By Mr. Hedges: It is on the Southeast Quarter of Section 28?

A. Yes, that is right. I located it right here.

Q. Mark it with a "T-13." Now, how did you get to the location T-13 on the map? Did you walk or drive?

A. I walked. I walked rapidly down here and meandered around to this location and posted it.

Q. Now, wait a minute. Be sure you are right in what you are telling us. Now, you are sure you didn't go down the highway and then to this location?

A. No, no.

Q. You walked across country?

A. Open country. This is all open country. You can walk as fast as you can walk in the sand and that was the easiest way to get there, the quickest.

Q. You are indicating—you started at the point "D" on the map?

A. No, no, wait a minute. Where is the highway?

Q. Right here.

A. I went right across here. [306]

Q. Indicating that you started at point "D" on the map, Plaintiffs' Exhibit 1, and went in a southerly direction down the section line—center section line?

A. I stepped it off—checked that and it was right about—

(Testimony of Herbert C. Thompson)

Q. You are referring now to the center of Section 29?
A. Yes.

Q. Now, which way did you go from there?

A. I meandered right through here.

Q. You went in a semi-circle in an easterly direction?

A. Yes, on the ridge, see. To the point marked T-13, yes.

Q. T-13, is that right?

A. That is right. And I located that while I was there.

Q. What do you mean by "there"?

A. That is the Southwest Quarter of Section 28.

Q. The claim known as Silver Heels No. 4, is that correct?
A. That is right.

Q. Now, this map that you are looking at here—did you make this map, the one you have in your hand?

A. No. That is the one we had, the map Mr. Norris made.

Q. And the figures that are designated on this map as [307] to time, they were not put on there by you, were they?
A. No, but I witnessed the time.

Q. Did you keep an independent record of the time that you posted these claims?

A. Yes. I made my field notes along with him and he took them all.

Q. You don't have your notes?

A. No; I gave them to him. We checked and double checked and did everything according to Hoyle.

Q. When you left the Southwest Quarter of Section 28 from a point marked T-14, where did you go then and by what direction?

A. Then I checked my distance and went on a bee-line instead of meandering and went on back to the car.

(Testimony of Herbert C. Thompson)

Q. Wait a minute. You can't say "meander." It does not help us in the record. Did you go in a northerly direction? A. No, west.

Q. Westerly? A. Yes.

Q. In other words, you backtracked over the same route you took to get there? A. Yes, more direct.

Q. And you went in a westerly direction, in a semi-circle, to the center of Section 29 and then due north. Is [308] that right? You went back to point "D" again?

A. That is right.

Q. Back up to here?

A. Yes, that is right. You see, I did that to check with that monument.

Q. You only had the two stakes with you at the time you went down to points T-13 and T-14? A. Yes.

Q. Then did you go back up to the car again?

A. Yes.

Q. What did you do then?

A. I got the other two stakes, the Horse Shoe 3 and 4 and went back and located them.

Q. Now, tell us the route you took to get back?

A. Right straight back here.

Q. From point "D" down to the center line of Section 29? A. That is right.

Q. To the Southeast Quarter of Section 29, is that right? A. Yes.

Q. All right. Where did you post the notice on that quarter section? A. Right here.

Q. Let us indicate that with a T-15. [309]

A. All right.

Q. You say to the best of your knowledge or recollection now that was about 1:45 p.m.? A. Yes.

(Testimony of Herbert C. Thompson)

Q. And you put these down in your field notes?

A. Yes.

Q. You carried a watch?

A. Mr. Norris did all the timing.

Q. You didn't have a watch with you? A. No.

Q. Now, how did you get from there over to the Southwest Quarter of Section 29? A. I walked.

Q. Walked right across the section?

A. Yes; and located it and built the monument.

Q. Let us mark that with a T-16. Then you went back to the car again, straight up the center line of Section 29 to point "D" to the automobile?

A. Yes, sir.

Q. Then the two of you drove off down the highway in an easterly direction? A. Yes.

Q. All right, take the stand again.

The Court. Do you have any further questions?

Mr. Hedges: Yes, your Honor, I have one or two more. [310]

Q. By Mr. Hedges: You said on the claims you and Mr. Norris staked together he held the stakes and you hammered them into the ground, is that right?

A. As I remember that is the way it was done.

Q. How many hammers did you have with you that day?

A. Well, a hammer and a hand axe and a pick.

Q. A little of everything? A. Yes.

Q. What did you take with you when you went down to stake your claims individually?

A. I had just a little—I don't remember—I just had the small hatchet, hammer, and I used—I found I could use boulders down there.

(Testimony of Herbert C. Thompson)

Q. How far did you drive the stakes into the ground?

A. Oh, about 10 or 12 inches.

Q. Is that sandy soil there? A. Yes.

Q. Wasn't hard?

A. That is why I built the monument.

Q. Mr. Norris testified that you left him at about 11:20 to go down and post Silver Heels 3 and 4?

A. That is approximately correct.

Q. Is that correct to the best of your recollection?

A. Yes, sir.

Q. Then when you came back from posting Silver Heels [311] 3 and 4 did you tell Mr. Norris the approximate time that you posted those two notices?

A. Not only told him but I had it on the little note I gave him.

Q. How did you estimate it? You said you didn't have a watch.

A. Well, it takes just about so long to walk that distance. We had already walked it, you see, according to the time here, and he checked and found that I was about right. He made all the notes on that.

Q. He couldn't see you at all times, could he, when you were down at Silver Heels 3 and 4?

A. No, but I could see him. I could see the road all the time.

Q. Did you have a hand signalling system, or how did you arrive at the time? A. What?

Q. Did you have a hand signalling system?

A. Well, I got down there and stood up and gave the signal. I don't remember. I think he saw me most of the time.

Q. All right. In other words, you estimated the approximate time that you got to these locations?

(Testimony of Herbert C. Thompson)

A. Yes, that is right, and in checking back that is correct. [312]

Q. The time that he has marked on Defendants' Exhibit R, are approximate times insofar as the posting of the four claims that you posted is concerned, is that correct?

A. Well, they are approximate by checking. You see, if you notice the time we posted the last one and the time I got there and back it checked with the time it took me to go to the others and the hiking is about the same—the walking and spacing is about the same, so it is pretty accurate.

Mr. Hedges: That is all.

The Court: Any further questions?

Mr. Painter: No.

The Court: Call your next witness.

Mr. Painter: Your Honor, I have reached the point, because of the fact a situation arose this afternoon, that I am going to have to tell the court I cannot proceed until my witness has a wisdom tooth extracted, Mr. Wilson. He is our engineer. You saw him in court for the last two days. We decided today he had better go down to see a dentist and have the tooth taken care of.

He left and I have used up my last witness. However, Mr. Wood told me that he would be able to proceed with a Mr. Lancaster, one of his witnesses, to fill in the time.

Mr. Wood: If your Honor wishes to proceed out of order I will be glad to do that. [313]

The Court: Well, these witnesses coming from a distance we will use up the 20 or 25 minutes remaining.

Mr. Wood: Mr. Lancaster lives here.

The Court: We will take him, anyway.

WILLIAM F. LANCASTER,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: William F. Lancaster.

Direct Examination

By Mr. Wood:

Q. Mr. Lancaster, I show you two pictures and ask you if you have ever seen those before? A. Yes.

Q. Did you take those pictures? A. I did.

Q. And on what date?

A. On March 17, 1946.

Q. And they were taken where?

A. On the property in question, Northeast Quarter of Section 28.

Q. And do you know whose work that was?

A. Yes, this is work done by Mr. Lewis.

Q. Both of those pictures are taken on the same [314] quarter section? A. That is right.

Q. And they show two different ends of the work, is that right? A. That is correct.

Mr. Wood: We offer these, if the court please, as a defendants' exhibit.

Mr. Hedges: Did he say the Northwest Quarter of Section 28?

The Witness: Northeast Quarter.

The Court: Are these the same or different views?

Mr. Wood: Different views of the same piece of work, your Honor.

Mr. Hedges: The exhibit number, please?

(Testimony of William F. Lancaster)

The Court: They may be received.

(The documents referred to were marked as Defendants' Exhibits S and T, and were received in evidence.)

Q. By Mr. Wood: Now, Mr. Lancaster, I show you 16 documents and ask you to examine them and tell me whether you have seen those before?

A. Those are the ones.

Q. Now, directing your attention to a document that has reference to the Northeast Quarter of Section 20, Township 14 South, Range 12 East, was there a duplicate [315] document of that made?

A. Yes, there was.

Q. And on what date was that, Mr. Lancaster?

A. That was made on January 17th.

Q. And what was done with the duplicate document?

A. The duplicate document was placed into the ground in a can on the northeast Quarter of Section 20.

Q. And who placed it there?

A. Let me see, Mr. John A. Jose.

Mr. Hedges: Just a minute. We object to that as being a conclusion of this witness.

The Court: Were you along?

The Witness: Yes, I was along.

Q. By Mr. Wood: You were present with Mr. John A. Jose on that day? A. Yes.

Q. Throughout the entire day?

A. The entire day, yes.

Q. Now, what was done with the documents that you have in your hand?

The Court: What is the date of that document?

Mr. Wood: 17th of January, 1946.

(Testimony of William F. Lancaster)

The Witness: Well, this document—I filed this document with the County Recorder on the same day at 4:30 p.m. [316]

Q. Now, after you got it back from the County Recorder did you do anything further with the document?

A. Yes. After we completed our location work on the property I re-filed this document with the County Recorder on April 12th, 1946.

Q. Now, did you add anything to the document prior to the re-filing of it?

A. Yes. I myself filled in the statement on the back of it, marking the boundaries, which read:

“The Southeast Quarter of Section 20, Township 14 South, Range 12 East. S.B.B. & M.”

And then in the statement of discovery work performed I filled in the following:

“By performing at least \$1.00 worth of work for each acre included in said claim, removing a minimum of 600 cubic yards of material to discovery of Montmorillonite on said claim, and sinking a shaft and open cut to a depth of at least ten feet from the lowest part of the rim at the surface.”

And then I signed my name as for the rest of the owners.

Q. And after you had done that you had it re-recorded?

A. That is right, on April 12th, 1946.

Mr. Wood: We offer this as the defendants' next exhibit, if the court please. [317]

The Court: All right.

The Clerk: Defendants' Exhibit U.

(The document referred to was marked as Defendants' Exhibit U, and was received in evidence.)

[DEFENDANTS' EXHIBIT U]

NOTICE OF LOCATION

Placer Claim

Notice Is Hereby Given: That the undersigned citizens of the United States, over the age of twenty-one years, in compliance with the requirements of Chapter VI, Title 32, of the revised Statutes of the United States and the local customs, laws and regulations, have this day located and claim the following described Placer Mining grounds, viz:

Being the Northeast $\frac{1}{4}$ Section 20 Township 14 South, Range 12 East

together with all water and timber appurtenant, allowed by law, are hereby claimed.

This Claim consisting of 160 acres, or number of feet claimed, shall be known as the Clay No. 3 District, County of Imperial, State of California, Section 20, Township 14 S, Range 12 E, Meridian S.B.B.M.

This Claim to be identified by its proximity to the following natural object or permanent monument, to-wit:

.....
Located This 17th day of January, 1946.

The date of the discovery and posting of this notice is the 17th day of January, 1946.

Locators:

Ella Jackman	Corda Lancaster
John I. Jackman	Wm. F. Lancaster
Olga Jose	Geo. T. Renaker
John A. Jose	John S. Patten

(Defendants' Exhibit U)

Witnesses

The exterior boundaries of a Placer Claim cannot be limited by any local mining regulation to less than 25x1500 feet, measuring from the center of vein on either side.

Pub. Res. Code 2313, within ninety days after the posting of this notice of location upon a lode mining claim, placer claim, tunnel right or location, or mill site claim or location, the locator shall record a true copy of the notice together with a statement of the markings of the boundaries as required in this chapter, and of the performance of the required discovery work, in the office of the County Recorder of the County in which such claim is situated.

STATEMENT OF THE MARKINGS OF THE
BOUNDARIES

The markings of the boundaries of the aforesaid Claim as required by Section 2303 Public Resources Code, are designated and described as:

Northeast $\frac{1}{4}$ of Section 20, Township 14 South, Range 12 East, SBBM

STATEMENT OF DISCOVERY WORK
PERFORMED

The locator has performed discovery work as required by Section 2304, Public Resources Code, as follows:

By performing at least one dollar worth of work for each acre included in said claim, removing a minimum of

(Defendants' Exhibit U)

600 cubic yards of material to discovery of Montmorillonite on said claim, and making an open cut to a depth of at least ten feet below the surface.

Ella Jackman	John I. Jackman
by Wm. F. Lancaster	by Wm. F. Lancaster
Corda Lancaster	John S. Patten
by Wm. F. Lancaster	by Wm. F. Lancaster
John A. Jose	Olga Jose
by Wm. F. Lancaster	by Wm. F. Lancaster

Locators

Geo. T. Renaker
By Wm. F. Lancaster
Wm. F. Lancaster

Order No. 48

When recorded, please mail this Instrument to

Wm. F. Lancaster
1110 West 50th Street
Los Angeles 37, Calif.

Recorded Jan 17 1946 4:30 P.M. in Book 624 Page 292 Official Records Imperial County, Calif.

At Request of

Grantee.....	Grantor.....	Trustee.....
Mortgagee.....	Mortgagor.....	
Wm. F. Lancaster		
Sheriff.....	Attorney.....	Locator.....

Evalyn B. Westerfield, County Recorder By Evalyn B. Westerfield Deputy

(Defendants' Exhibit U)

I certify that I have correctly transcribed this document in above mentioned book. B. J. Hyne Copyist

\$1.00 Indexed Compared Book & Paged

Recorded Apr 12 1946 10 A.M. in Book 624 Page 374 Official Records Imperial County, Calif.

At Request of

Grantee..... Grantor..... Trustee.....
Mortgagee..... Mortgagor.....
Wm. F. Lancaster
Sheriff..... Attorney..... Locator.....

Evalyn B. Westerfield, County Recorder By Evalyn B. Westerfield Deputy

I certify that I have correctly transcribed this document in above mentioned book. Jo Stevens Copyist

\$1.00 Indexed Compared Book & Paged

Case No. 6105-Y Civ. Hattie M. Houck vs. J. A. Jose et al. Defts. Exhibit U. Date Jun. 4, 1947. No. U in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. John A. Childress, Deputy Clerk.

Q. By Mr. Wood: I show you a document which purports to affect the Northwest Quarter of Section 20, and will ask you to examine that and tell me what it is.

A. I have seen this document and I placed the duplicate in the ground.

Q. You had an exact duplicate of that placed in the ground? A. Yes.

Q. Where was it placed?

A. On the Northwest Quarter of Section 20.

(Testimony of William F. Lancaster)

Q. That was placed in the ground by yourself or Mr. Jose? A. Mr. Jose.

Q. But you were present at the time?

A. I was present at the time.

Q. Now, what did you do with the document that you have in your hand?

A. I had this document recorded on January 17th in the County Recorder's office in Imperial County.

Q. Was the document subsequently returned to you?

A. It was. [318]

Q. Did you add anything to it?

A. Yes. On the back of this document following the "Markings of boundaries," I put "Southeast Quarter, Section 29, Township 14 South, Range 12 East, S.B.B.M."

And under "Statement of discovery work performed: By performing at least \$1.00 worth of work for each acre included in said claim, removing a minimum of 560 cubic yards of material to discovery of Montmorillonite on said claim, and making an open cut to a depth of at least ten feet below the surface," and signed my name.

Q. And the names of the other locaters by yourself?

A. Yes.

Mr. Wood: We offer this in evidence as the defendants' next exhibit in evidence.

The Court: Very well.

(The document referred to was marked as Defendants' Exhibit V, and was received in evidence.)

Q. By Mr. Wood: I show you now a document, Mr. Lancaster, that purports to affect the Southwest one-quarter of Section 20, Township 14 South, Range 12

(Testimony of William F. Lancaster)

East, and ask you to examine that and tell me whether you have ever seen it before? A. Yes, I have.

Q. And when?

A. On January 17th, 1946. [319]

Q. And did you see a duplicate of that document?

A. Yes, I saw it made.

Q. And what was done with it?

A. The duplicate was placed in a can in the ground in the Southwest Quarter of Section 20.

Q. By Mr. Jose?

A. Mr. Jose and myself.

Q. Now, what did you do with the original that you have in your hand?

A. Had this document filed with the County Recorder of Imperial County.

Q. On what date?

A. The 17th of January, 1946.

Q. Was that document returned to you by the County Recorder? A. It was.

Q. Did you add anything to it?

A. I did, yes. On the back of the statement: "Marking of boundaries: Southwest Quarter of Section 20, Township 14 South, Range 12 East, S.B.B.M. Statement of discovery work performed: By performing at least \$1.00 worth of work for each acre included in said claim, removing a minimum of 650 cubic yards of material to discovery of Montmorillonite on said claim, and making an open cut and sinking a shaft to a depth of at least ten feet from the lowest part of the rim at the surface," and signed by myself [320] for the rest of the locaters and re-recorded on April 12th, 1946.

(Testimony of William F. Lancaster)

Mr. Wood: We offer this as Defendants' Exhibit next in order in evidence.

The Court: It will be received.

(The document referred to was marked as Defendants' Exhibit W, and was received in evidence.)

Q. By Mr. Wood: I now show you a document, Mr. Lancaster, that purports to affect the Southeast one-quarter of Section 20, Township 14 South, Range 12 East, and ask you to examine that and tell me whether you have ever seen it before? A. I have.

Q. And on what date?

A. On January 17th, 1946.

Q. Was there a duplicate of that document made?

A. There was.

Q. And what was done with the duplicate?

A. Placed in a can in the ground on the Southeast Quarter of Section 20.

Q. By whom? A. Mr. Jose.

Q. You saw him do it? A. I saw him do it.

Q. What was done with the document that you have in [321] your hand?

A. Recorded that on January 17th, 1946, in the County Recorder's office of Imperial County.

Q. Was that document subsequently returned to you by the County Recorder? A. It was.

Q. Did you add anything to it?

A. Yes. On the back of the document: "Statement of marking of boundaries," I said—

The Court: You put in the same language?

Mr. Wood: The same language with only this exception.

(Testimony of William F. Lancaster)

The Court: You put the same legend on that you put on the others and had it re-recorded, is that correct?

Mr. Wood: With one exception, your Honor, with the exception of the description and the number of cubic yards removed.

The Court: All right, if there is a difference in the cubic yards just say how many cubic yards it indicates. It is in the record.

The Witness: All right, 600 cubic yards of material taken out of the claim.

Mr. Wood: We offer this as the defendants' next in evidence.

The Court: It will be received. [322]

(The document referred to was marked as Defendants' Exhibit X, and was received in evidence.)

Mr. Wood: If your Honor has no objection, may I ask the witness to examine all of these and ask him whether he put them in in the same manner and the same quarter section?

The Court: Yes.

Mr. Hedges: We have no objection.

The Court: They can cross examine if they care to in more detail.

Q. By Mr. Wood: Just examine all these documents and then I will ask you some questions. A. Yes.

Q. Now, were duplicates made of all those documents?

A. There were.

Q. And were those duplicates put in cans and put into the ground in the various quarter sections described in the documents? A. They were.

(Testimony of William F. Lancaster)

Q. By yourself and Mr. Jose?

A. That is right.

Q. And these original documents were all recorded with the County Recorder's office?

A. That is right.

Q. And after they came back from there were endorsed on the back by you, a statement of the markings of the [323] boundaries and a statement of the work performed as appears on each document?

A. That is right.

Q. And they were then re-recorded with the County Recorder's office?

A. That is right.

Mr. Wood: We offer these as the defendants' next in order.

The Court: How many do you have?

The Clerk: There are four.

Mr. Wood: They can be marked as one exhibit as far as I am concerned.

The Court: They are all dated the same?

Mr. Wood: Yes.

The Clerk: The complete group is exhibit U to X, inclusive, and then AA to JJ, inclusive.

(The documents referred to were marked as Defendants' Exhibits U to X and were received in evidence.)

(The documents referred to were marked as Defendants' Exhibits AA to JJ, inclusive, and were received in evidence.)

[Clerk's Note: Counsel stipulate Exhibits V to Z and AA to JJ inclusive, are similar to Exhibit U, save and except as hereinafter set forth:

In Exhibit W, the yards of earth removed are stated to be 650 cubic yards.

In Exhibit X, the yards of earth removed are stated to be 600 cubic yards.

In Exhibit Y, the yards of earth removed are stated to be 850 cubic yards.

In Exhibit Z, the yards of earth removed are stated to be 850 cubic yards.

In Exhibit AA, the yards of earth removed are stated to be 1,740 cubic yards.

In Exhibit BB, the yards of earth removed are stated to be 830 cubic yards.

In Exhibit CC, the yards of earth removed are stated to be 460 cubic yards.

In Exhibit DD, the yards of earth removed are stated to be 820 cubic yards.

In Exhibit EE, the yards of earth removed are stated to be 400 cubic yards.

In Exhibit FF, the yards of earth removed are stated to be 400 cubic yards.

In Exhibit GG, the yards of earth removed are stated to be 1,000 cubic yards.

In Exhibit HH, the yards of earth removed are stated to be 725 cubic yards.

In Exhibit II, the yards of earth removed are stated to be 550 cubic yards.

In Exhibit JJ, the yards of earth removed are stated to be 600 cubic yards.

Each of said Notices of Location contain the name of the claim involved, its correct legal description, and the book and page in which said Notice of Location was recorded in the Office of the County Recorder of Imperial County, California.]

(Testimony of William F. Lancaster)

Q. By Mr. Wood: Now, Mr. Lancaster, were you ever on this property prior to the 17th day of January, 1946? A. Yes, many times.

Q. Approximately when were you first on the property? [324]

A. It was back in 1939 or 1940.

Q. Now, after January 17th, 1946 were you on the property? A. What day?

Q. After January 17th, 1946? A. Oh, yes.

Q. Were you on the property while any work was being done there by Mr. Jose? A. Yes, I was.

Q. Can you tell us the approximate date of that?

A. Let me see. I was down there along the first of February of 1946, and again about the middle of February, and again on March 17th, I believe.

Q. Now, what work was Mr. Jose doing there?

A. He was performing his location work at the time.

Mr. Hedges: That is objected to as being a conclusion of this witness.

The Court: That may be stricken. What was he doing? Describe what he was doing.

The Witness: Well, he was digging a pit and piling up dirt pursuant to the location work on the property.

Q. By Mr. Wood: Do you remember how many quarter sections he covered during that period of time?

A. Yes; he worked on all 16 quarter sections at the time.

Q. Do you recall at this time approximately how much [325] money had been expended?

A. Yes. He had expended over \$1,000.00 up to that time.

(Testimony of William F. Lancaster)

Mr. Hedges: Just a minute. I object to that as a conclusion of this witness when he said how much money he spent unless he knows. There is no proper foundation.

Q. By Mr. Wood: Who was paying the bills for that work? A. I was.

Q. And how much money had you paid out in connection with that work?

A. Well, to be exact I paid out \$1,367.00 for that work down there.

Q. That was work done by Mr. Jose?

A. That is right.

Q. On all 16 quarter sections?

A. That is right.

Mr. Wood: You may cross examine.

Cross Examination

By Mr. Hedges:

Q. Did you pay this money, this \$1,367.00 direct to Mr. Jose?

A. I paid part to Mr. Jose and part to Mr. Dexter.

Q. How much of the \$1,367.00 did you pay to Mr. Jose? A. All but \$720.00. [326]

Q. In other words, \$600.00 you paid to Mr. Dexter?

A. That is right.

Q. \$700.00, roughly, to Mr. Jose. Who is Mr. Dexter?

(Testimony of William F. Lancaster)

A. He was the man operating a bulldozer down there.

Q. Operating a bulldozer?

A. Yes, sir; and doing also some pick and shovel work.

Q. Did he render a bill for his services to the extent of \$600.00? A. Yes, he did.

Q. Do you have that?

A. I think I have it in my files or cancelled checks for it, either one.

Q. Would you produce that when the trial opens tomorrow? A. Yes, sir.

Q. And the \$700.00 that you paid to Mr. Jose, was that pursuant to an invoice of some type?

A. Mr. Jose gave me a receipt for the money expended there, showing me the bill which I checked at the time.

Q. Do you have the receipt? A. Yes.

Q. Would you produce that tomorrow, too, please?

A. Yes.

Q. And you said you paid—did Mr. Jose give you any of the bills that represented any of the \$700.00 payment? [327] A. No, he did not.

Q. The only thing you have is his receipt?

A. That is right.

Q. You have testified, I believe, that you made all of the payments for the work done out there for this period of time on the 16 claims, is that correct?

A. That is right.

(Testimony of William F. Lancaster)

Q. The total amount expended was \$1,367.00?

A. That is right.

Q. Was that all the work that was performed on the property?

A. Up to that time, it was, yes.

Q. Up to what time now?

A. Up to March 17th.

Mr. Hedges: No further questions.

The Court: All right, step down.

Any redirect examination?

Mr. Wood: No, your Honor.

The Court: Do you want him to produce those bills tomorrow?

Mr. Hedges: I assumed he would be here.

The Witness: I paid one by cashier's check.

The Court: Whatever you have bring along with you tomorrow.

All right, gentlemen, we will recess until tomorrow morning at 10:00 o'clock. [328]

(Whereupon, at 4:45 o'clock p.m., a recess was had until Thursday, June 5th, 1947, at 10:00 o'clock a.m.) [329]

Los Angeles, California, Thursday, June 5, 1947

10:00 A. M.

The Court: Proceed with the cause on trial.

Mr. Hedges: May I ask if Mr. Lancaster brought the receipts that I asked for yesterday?

Mr. Wood: We have some of them. I will have them for you.

The Court: Call your next witness.

Mr. Painter: Mr. Wilson.

WILLIAM E. WILSON,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: William E. Wilson.

Direct Examination

By Mr. Painter:

Q. Mr. Wilson, what is your business or profession?

A. I am a mining engineer.

Q. And what are you presently engaged in doing?

A. Mining engineering.

Q. And are you engaged in mining engineering for yourself or for others?

A. At the present time I am engaged for myself almost exclusively, and have been for the past several years. I [334] own and operate the Paragon Hydraulic Mine at Forest Hills, California and operate it at the present time and have at all times for the past eight years.

Q. And is Forest Hills your home?

A. Forest Hills is my home.

(Testimony of William E. Wilson)

Q. For how long a period of time have you been engaged in your profession as mining engineer?

A. For 30 years.

Q. And primarily in what locality have you been engaged in that profession?

A. Primarily in the State of California, extending from Canada through into Old Mexico, but mostly in California, in the Mother Lode areas and the desert areas and a good deal of time around and through Arizona and the desert regions around Yuma.

Q. Are you familiar with the property here involved?

A. Yes, I am.

Q. And when did you first become acquainted with the property?

A. In the first of June—in the first days of June, 1945.

Q. Prior to that time had you been generally familiar with this particular property—that is, in this area?

A. I had made mining examinations in the area and in [335] the mountains and examined the Monte Cristo Mine out of Wickenburg in Arizona and made many trips into Salton Sea area and through Blythe and in that area.

Q. In connection with the practice of your profession as an engineer has it been a part of your duties to estimate the cost of excavating dirt and soil of a character similar to the dirt and soil involved in the property involved in this action?

A. Yes.

Q. And how frequently over the past 15 or 20 years have you been required to do so?

A. Well, the excavation of soils in the engineering profession is something that is daily incidental to the construction of roads, the building of bridges, removing of

(Testimony of William E. Wilson)

earth, sinking of shafts and dredging and that sort of thing. That is a part of my profession. It is done regularly.

Q. And were you familiar with the reasonable value or worth of moving earth of the character which is involved in this action on this property during the years 1945 and 1946? A. Yes, sir.

Q. You say that you visited this property first in June of 1945? A. That is right.

Q. In company with whom? [336]

A. With Mr. J. C. Bergere and Mr. Willard Wallace.

Q. What was the purpose of this visit to the property?

A. We visited some area south of the property under discussion here. Mr. Bergere and Mr. Wallace at that time contemplated acquiring title to some of those lands and I made a general examination of the area.

Q. And did you during the course of that visit actually go up on the property here involved?

A. I did, but only incidentally.

Q. When did you next visit the property in question?

A. I visited it next on the 4th day of November, 1945.

Q. For how long a period of time after the 4th day of November, 1945 were you in and about the property?

A. Continuously until November 12th.

Q. By "continuously" you mean every day you were on the property?

A. Every day, yes, from November 4th through November 11th inclusive, and I left on the morning of the 12th and came to Los Angeles.

Q. By whom were you employed to make this trip to the property? A. By Mr. Willard Wallace.

(Testimony of William E. Wilson)

Q. And what was the purpose of the visit to the property on this occasion? [337]

A. The purpose of the visit to the property here was to make an examination, locate the development work or exploration work.

Q. And did you supervise the doing of any work on the property during that period of time?

A. Yes, I laid it out and directed it.

Q. Prior to the time that you commenced your work on the property did you make a physical examination of the property during this period from the 4th of November on? A. Yes, I did.

Q. And in making that physical examination of the property did you personally travel over each and every one of the quarter sections involved in this action?

A. I did.

Q. Will you describe for us the physical appearance and general contour of the property?

A. Yes, I will. There is a road traversing the property that bisects—I took as a middle line from east to west as you enter the property. We go through to the western boundary. Starting at the western boundary of the property we come back one thousand feet until we reach the rim of an escarpment that probably is about 40 feet in elevation above the floor of the Valley right there.

This escarpment has a generally northwest trend north of the road and runs north and south of the road into [338] the foothill region. After you drop off this escarpment, passing to the east, you come into a typical desert terrain where the surface is cut and eroded by small streams. There are small promontories or obstructions in the desert that look almost like small islands where

(Testimony of William E. Wilson)

the softer soils have been eroded away beyond them and as you pass on another mile and a half you come into a typical desert creek bed that is on the eastern extremity of the property. In all appearances it is typical of any of the desert lands that would be found in the southwest. There are no distinguishing characteristics.

Q. Did you personally supervise any exploratory work on the property?

A. Supervised all that was done and in Mr. Wallace's behalf.

Q. Prior to the time that you started the exploratory work did you lay out a program which was to be followed—that is, where the work was to be done and the nature of the work that was to be done?

A. It was necessary to do that because I wanted the money spent there to return a maximum value to Mr. Wallace and his associates from an engineering standpoint—that is, possible production later on. And also to give them some accurate idea of the physical properties of the property.

Q. Did you discuss this exploratory work—that is [339] the doing of the exploratory work with anyone prior to the time that it was started, outside of Mr. Wallace?

Mr. Hedges: Will you read that question?

(Question read.)

A. No one except Mr. Igle.

Q. By Mr. Painter: Who is he?

A. A contractor and then a resident in the Planters Hotel in Brawley. He owned equipment that seemed to me suitable. I examined the equipment and found out it

(Testimony of William E. Wilson)

was owned by Mr. Igle and I looked him up in the Planters Hotel.

Q. Now, prior to the time that any work was commenced on the property, will you start in and describe for us the detail of what you did preparatory to starting the work? A. May I step down, please?

The Court: Yes.

A. If we are agreed that this is the south boundary of Section 21 and Section 20—I will make no reference to these sections in here.

I went to the General Land Office and determined that the base line or the southern boundary of these two sections were determined by survey, the first of which was made in 1857 and the second in 1859, confirmed again in 1899, or 1889, and the bearing of this line, which is important to this discussion, was north 89 degrees and 58 minutes west.

The reason I wanted to get the bearing was because [340] it wasn't possible or desirable to make a solar observation in the desert. Monuments could not be changed there because we were not making a survey; we were laying out work that had already been marked and we wished to lay the work out in conformity, but it was necessary to run a traverse to determine that those monuments had not been moved. I found them all to be in line and in setting up the transit over this position here—

Q. Will you describe that position?

A. All right. This position would be the southwest corner of Section 28 and the Southeast corner—I beg your pardon, wait until I put my glasses on. I know that this is Section 21 and not 28 from memory. This would be the southwest corner of Section 21 and the southeast

(Testimony of William E. Wilson)

corner of Section 20. Incidentally, it would be the north-east corner of Section 29 and the northwest corner of section 28.

Setting the transit up over this point and orienting it in a great circle that would pass through these two monuments here, I chained back 2,640 feet to a point in this area here. Then I turned an angle on the vernier, using the compass at no time, turned an angle on the vernier of north no degrees and two minutes west and chained through 3,400 feet to this point here. The 3,400 feet was an arbitrary figure so far as I was concerned. I was interested only in bisecting this section and running parallel to [341] these side lines. The bearing of this side line, according to the survey and the records in the United States Land Office, is north no degrees and two minutes west. This side line conformed with that.

Coming back to this point I set the transit up again and oriented this line and chained 3,400 feet through to this point, the object of that being that I had determined that trenching could be done so that the excavations could be more extensive in any one place and fall equally on one claim and on the other, but it was necessary to have an accurate division of the quarter sections to do that.

The second step was to come back again and orient the transit and chain 2,640 feet to this point here, to turn an angle of no degrees, two minutes west on the vernier and run 3,400 feet through coming back to this point, to repeat the process, and run a straight line through.

This line here—I see it is marked on here, is north three minutes. In other words, there is only one minute difference between the side line here and this line here. This line here, north zero and two minutes west, is com-

(Testimony of William E. Wilson)

mon to both sections and was straight and parallels this line.

When that was done, coming back to the point of beginning, I measured out here to this point 1100 feet and located the first pit. I came on out here three thousand, [342] one hundred feet and located the second point.

Q. Now, Mr. Wilson, while you are going through that phase of it will you go back and start in, say, when you reached this point here? A. Yes.

Q. Tell us the quarter sections involved in that pit and say that you located your pit involving the quarter section thus and so and thus and so?

A. All right, fine. When I came to this point here and located the work—it was to locate the location work, the exploration or the discovery work on the Northeast Quarter of Section 28 and the Northwest Quarter of Section 28.

Q. Do the same thing with the next one and take all the locations you made.

A. All right. Passing down here then 3,100 feet I laid out a pit area here that would satisfy the development work on the Southeast Quarter of Section 28 and on the Southwest Quarter of Section 28.

Again returning to the starting point here, I came out here 1,900 feet and laid out the pit location that would satisfy the discovery work on the Southeast Quarter of Section 29, and on the Southwest Quarter of Section 29.

Q. Mr. Wilson, I believe you have made a mistake.

A. Yes, correction, please. That is Section 21. In [343] passing on here to 3,100 feet I laid out a pit location across this line here that would satisfy the work on the Northwest section—Northwest Quarter of Section 21 and on the Northeast Quarter of Section 21.

(Testimony of William E. Wilson)

Q. Now, that point you are pointing to is the one we have heretofore marked with the point "D"?

A. Yes, at point "D." Coming back to point "D" I came along this line here 1,100 feet and laid out a pit across this line that would satisfy the development work on the Northeast Quarter of Section 29 and on the Northwest Quarter of Section 29.

Continuing on into the desert 3,100 feet I laid out another pit across this section line here that would satisfy the development or discovery work on the Northwest Quarter of Section 29 and—beg your pardon, on the Southwest Quarter of Section 29 and on the Southeast Quarter of Section 29.

Returning to point "D" I went 1,400 feet along the line previously described and laid out a pit.

Q. By Mr. Wood: How many feet?

A. 1,400 feet. And laid out a pit that would satisfy the discovery work on the Southwest Quarter of Section 20 and on the Southeast Quarter of Section 20.

Continuing on over 3,400 feet I laid out another pit that would satisfy the discovery work on the Northwest [344] Quarter of Section 20 and the Northeast Quarter of Section 20.

Q. By Mr. Painter: Now, will you resume the stand, please. Mr. Wilson, after you had located these points which you have just described, which we will call the points for the discovery work, did you place any stakes in and about the area to designate the spot where that pit was to be placed

A. Yes, I did.

(Testimony of William E. Wilson)

Q. And will you describe for us just how you placed those stakes in the ground—that is, the approximate measurement between stakes?

A. Yes. The stakes were the standard surveyors' stakes. They were about two inches in width, $7/8$ ths of an inch thick, and 18 inches in length. Those stakes were so placed that the center line stakes were clearly marked and 20 feet from the point of excavation so it would not be disturbed during the time of excavation.

Then taking a distance sixty feet to the west another stake was placed. Coming back from the center line stakes sixty feet to the east, a stake was placed so that there would be 120 feet between the first two stakes. Then secondary stakes were placed 30 feet to the west and 30 feet to the east to provide for the approach and for the get-away from the proposed excavation which had been decided at that [345] time could best be done with a D-8 bulldozer, a conventional carry-all.

Q. Now, that was true on each one of the pits involved where you laid them out. You laid out the stakes as you have stated?

A. That is right. It gave the driver an opportunity to establish his entrance point. He knew where he had to level off and he knew where the cut terminated.

Q. While you were there on the property was some equipment moved onto the property to do that work?

A. Yes, that is right.

Q. And what did that consist of?

A. That consisted of a D-8 bulldozer, a carry-all, and incidental oiling and repair equipment.

Q. Now, the carry-all had a blade on it how wide?

A. Ten feet 8 inches in width.

(Testimony of William E. Wilson)

Q. For how many days was the bulldozer and carry-all of the property doing the work involved?

A. Five days continuously.

Q. Were you there all during the time that work was being done? A. At all times.

Q. With that equipment? A. Yes.

Q. Will you point out to us on the map the sequence in [346] which the cuts were made on the claims, and when you are describing the sequence in which those cuts were made will you describe the two quarter sections which were involved in the particular cut?

A. Yes, I will. The first cut was made here. That would be the Northeast Quarter of Section 28 and the Northwest Quarter of Section 28.

Q. Now, before you proceed further will you place on Plaintiffs' Exhibit 1 at approximately the point where that cut was made, a figure representing the way the cut existed after it was completed?

Mr. Painter: Does somebody have a colored pencil?

Mr. Hedges: Here are some different colors.

Mr. Painter: Let us get a different color.

The Witness: This map has been carefully prepared and it is to scale and I don't want to mutilate it. I don't have my own scale so I will just put on—

Q. By Mr. Painter: Without trying to put it on to scale give us as best you can, approximately, where the cuts were located and how they appeared?

A. All right. Shall I go through and put them all on?

Q. No, let us start in and mark them as you are going through. A. All right. [347]

Q. Will you mark that with a— A. No. 1.

(Testimony of William E. Wilson)

Q. No, wait just a minute, please. Will you mark it with the letter "E" in the center of the diagram? Now, the cut that you have endeavored to delineate on Plaintiffs' Exhibit 1 is found in which quarter sections?

A. Found in the Northeast Quarter Section of Section 28 and the Northwest Quarter Section of Section 28.

Q. All right, now will you place on the map the next one which was made and mark it with the letter "F"?

A. That is the order in which they were made?

Q. Right, sir.

A. All right. And what symbol, please.

Q. The letter F, please, and describe which quarter sections were involved.

A. That was made in the Southeast Quarter—Southwest Quarter, I beg your pardon, of Section 21 and in the Southeast Quarter of Section 21. That is excavation "F." And what symbol, please?

Q. Will you put the letter "G" there and then describe for us the quarter sections involved in the delineation of "G"?

A. Yes, the excavation "G" was for the benefit of the Northeast Quarter of Section 21 and the Northwest Quarter of Section 21. And what symbol, please? [348]

Q. "H." Now, will you describe for us the quarter sections involved in the delineation of the symbol covered by "H"?

A. The symbol covered by "H" was discovery work for the benefit of the Southeast Quarter of Section 28 and the Southwest Quarter of Section 28.

Q. Now, will you give us the next place where a pit was dug? A. And what symbol, please?

(Testimony of William E. Wilson)

Q. "I." Now, what quarter sections were involved with "I"?

A. "I" was the discovery work for the Northwest Quarter of Section 29 and the Northeast Quarter of Section 29.

Q. Will you place in that the latter "J." Now, what quarter sections were involved in the figure "J"?

A. The figure "J" covered the exploration work for the Southeast Quarter of Section 20 and the Southwest Quarter of Section 20.

Q. Mark that with "K," please. And what quarter sections were involved in the figure "K"?

A. The quarter section of the Northeast Quarter of Section 20 and the Northwest Quarter of Section 20 were involved in the discovery work of the symbol "K."

Q. And make the next one, please?

A. I beg your pardon? Is the letter "L"? [349]

Q. Yes, mark it with the letter "L." Now, what quarter sections were involved in the figure "L"?

A. "L" involved the Northeast, or, the Southeast Quarter of Section 29 and the Southwest Quarter of Section 29.

Q. Will you give us the appearance of each one of those cuts after the cut had been completed—by the way, while you are doing that, unless there is some consideration in the dimensions of any one cut, will you give us the dimensions of the cut when you have finished a description of it?

A. Yes. There was very little variation in the cuts but I will give them as we go along. May I use my glasses and step down, please?

(Testimony of William E. Wilson)

Q. Yes. Will you describe the cut when you are mentioning it by the symbol which describes it?

A. Yes, I will. In laying out these cuts I thought it desirable to put part of them on the high land and part of them on the low land for the purpose of discovery. That we can discuss later.

Beginning at "E" the cut "E" is placed on the high land from the desert floor. There were two or three feet of unconsolidated sands and gravel of overburden and as we passed into the successive passes with the bulldozer and carry-all, deepening this cut, we cut into a hard clay sur- [350] face that is intermittent with inclusions of unconsolidated sand and gravel. As we got down below seven feet in the cut "E" we found that this clay substance had become so hard that it was impossible to cut it and we abandoned further depth in this cut. We had no apparatus on the carry-all beyond the blade, but we did load the carry-all so it was stalled in the cut and then using first one track and then the other on the D-8, weighing about 20 tons, we dug down one side and then the other in an attempt to cut this clay as far as possible but it seemed to be sound and we couldn't cut it. This cut, therefore, has a depth of seven feet, 120 feet long with a 30-foot approach and a 30-foot ramp allowing the carry-all to pass out.

Q. Now, will you describe for us the dimensions of those two ramps and the dimensions of the balance of the cut exclusive of the ramps, giving us the dimensions of each one of those particular portions of the cut?

A. All right. Taking a minimum depth of this cut at six feet, that would be two yards in depth, a minimum width of 12 feet would be four yards in width. That

(Testimony of William E. Wilson)

would be eight yards and 120 feet would be four yards in length. That would be 320 yards. The ramps tapered from zero to six feet. They were 30 feet in length.

Q. That is each ramp?

A. That is right, so that we considered the two ramps [351] together represent an area that was 10 yards long, two yards in depth and four yards wide. Two times four would be eight, and 10 would be 80. 320. That would be 400 yards of excavated material from cut "E."

Q. That is 400 cubic yards? A. That is right.

Q. Now, what was done with the dirt and clay which was moved from the cut after the carry-all took it out of the cut?

A. Part of my assignment there was to determine the location of clay that was not visible except in eroded form in the desert, and in order that Mr. Wallace and his associates could examine the product of these holes as the carry-all emerged, it circled and dumped its load in successive concentric or half concentric rings so that the excavation from the beginning of the cut and from the second and third pass and fourth pass and so on to produce a result analogous to core drilling there so it could be seen by looking at the bottom of the cut the successive layers and the included material in the cut.

Q. All right. Now, have you given us the dimensions of that cut at "E"? A. That is right.

Q. Now, will you give us the dimensions of cut "G," without describing the operation at that point? [352]

A. All right, cut "G"—

(Testimony of William E. Wilson)

Q. After it was completed?

A. After completion it was 120 feet exclusive of the ramps which were 30 feet in an approach and 30 feet in discharge.

Q. And the width?

A. A minimum of six feet in depth and a width of 12 feet.

Q. And the cubic yardage of dirt?

A. 400 cubic yards removed.

Q. Approximately 400 cubic yards or over?

A. That is right.

Q. Now, was the method used in each one of these cuts as to the spreading of the material the same?

A. Identical.

Q. Now, will you give us the dimensions of the cut, discovery "F"?

A. The dimensions at the cut "F" were a 30-foot approach, a 30-foot discharge, and 120 feet of excavation on the bottom. That would be a minimum of six feet in depth and a minimum of 12 feet in width, and it would contain with the ramp and discharge 400 feet, approximately, of excavated material.

Q. Do the same thing for us on location "H."

A. On "H," this cut. There was 30 feet of approach, [353] 30 feet of discharge. 120 feet of excavation. A minimum of six feet in depth. A minimum of 12 feet in width and approximately 400 cubic yards of material removed.

Q. I believe on "F" you said 400 cubic feet. Was that cubic feet or cubic yards?

A. I want to correct that. It would be 400 cubic yards.

(Testimony of William E. Wilson)

Q. In each instance where you are referring to the cubic contents it is cubic yards you are referring to?

A. Always cubic yards.

Q. Now, do the same thing for us with reference to "I."

A. "I" is one of the conventional cuts, 30 feet of approach, 30 feet of discharge. 120 feet of excavation on the bottom, but with this difference at "I." On the west-erly end of the cut, the last 20 feet of the excavation, it was excavated to a depth of 12 feet in that particular instance, the greatest depth that was attained at any point in the desert by us.

Q. And what was the total cubic yardage?

A. The total cubic yardage excavated from that particular hole was 430 cubic yards, approximately.

Q. Now, do the same thing for us on "J."

A. All right.

Q. Just one second. Maybe we can shorten this. Was [354] there any difference as far as cubic yardage removed and method of operation on J, K, and L than on, we will say, E?

A. None, on J, on K. On K excavation was made in the stream bed to determine whether or not the clays there were deposited by erosion or whether it was in point of fact clay in place that was being eroded. I found clay in place being eroded and it was so hard here I could only attain a depth of four feet and consequently in order to accommodate the additional yardage I ran the cut from 120 feet to 180 feet in length and approximately 400 yards of excavated material. The same would be true of cut "L," as was true of cut "K," because both of those cuts were made where clay was exposed.

(Testimony of William E. Wilson)

The Court: Does the clay run throughout the entire area or is it spotty?

The Witness: No, Judge, it is continuous throughout the entire area—a narrow area of about 40 square miles in there. The quality of the clay varies. A mile west it might be coarser and so forth. That was the real difficulty.

The Court: Is there any difference in the overburden?

The Witness: No, none.

The Court: It is the same?

The Witness: The same. [355]

The Court: So in any excavating work you do you get some clay, depending on the quality?

The Witness: Exactly.

Q. By Mr. Painter: Now, after these cuts were completed did you examine each cut individually, personally?

A. During the time that it was being excavated. That was the most important mission I had—examine the possible clay content of those found among other things.

Q. And did you find the clay content had an appearance substantially the same in each cut?

A. In each cut, yes.

Q. Except where you noted the fact that it got so hard that you could not use a carry-all method any further?

A. That is right.

Q. Now, after these cuts were completed did you examine the cuts to determine whether or not the cuts were evenly divided as between the quarter sections?

A. I did in the original division of the ground. My center line stakes were there and probably still are. They were not disturbed at any time through the course of the

(Testimony of William E. Wilson)

operation. It was necessary to have that guide stake so that when the operator came in he dropped his blade at a particular point and came out at a particular point. The ramp approach, the approach of the leveling off, the center line of the cut, was all staked and it was made clear to the [356] driver that there could be no variation from the division of the cuts in relation to that center line.

Q. What I mean is, when they got through with the cuts did you examine the cuts to determine whether or not those directions had been followed?

A. I was personally present when every cut was made, not only to examine the stakes but to be sure that they were not moved.

Q. Mr. Wilson, what in your opinion was the reasonable value or worth of moving the earth which was moved out of each one of these cuts in November of 1945, basing it on a price per cubic yard?

Mr. Hedges: Objected to as irrelevant, incompetent and immaterial. The only thing that is material is what actually was spent in connection with the development work.

Mr. Painter: That isn't what the statute says.

The Court: I think I will overrule the objection. I believe it is material to the question of the value of the rights involved. I realize you stipulated to value but we may have to have some proof in the record.

The Witness: In my opinion, the earth-moving operation there is worth \$1.50 a yard.

Q. By Mr. Painter: Were you familiar with the going rate for day labor in that locality at that time?

A. I knew in general that day labor was worth \$1.00 a [357] day—beg your pardon, \$1.00 an hour for eight

(Testimony of William E. Wilson)

hours. I believe that was the prevailing price for farm labor and pick and shovel labor in the area.

Q. By Mr. Painter: Mr. Wilson, while you were making your examination on the property around the 4th of November and between that date and the 11th, did you observe any notices of location of any character posted on the property? A. (No answer.)

Q. I will shorten that somewhat, I assume, by telling you I am talking now about the ones which were found posted on a board and the stake driven into the ground. Will you just answer that yes or no first, please?

A. Yes.

Q. Now, will you point out to me the points at which you observed those notices posted which I have just referred to? A. I found four posted here.

Q. That is at point "B"?

A. Point B. Four posted here at point "D." I found two posted in the area here of our symbol "K." Two posted in the area here near our symbol "G." Two posted in the area here near symbol "H," and two posted in the area here near symbol "L."

Q. Did you examine each one of those claims of notice of location? [358] A. I did.

Q. And while examining the notice of location did you note whether or not the notice of location which you examined on each one of those claims contained correct description of the quarter section of the property involved?

A. Yes, I did.

Q. And did you note whether or not while making that examination that that particular claim containing a description of the quarter section was located on the quarter section involved? A. I did.

(Testimony of William E. Wilson)

Q. And while examining that claim did you note whether or not any names appeared on each one of those claims at the bottom of the claim?

A. It is my recollection that there were eight such names.

Q. And do you recall any of those names which you observed at that time?

A. Well, now, let me see. Most of the people were unknown to me, but I remember—I recall J. C. Bergere and A. L. Bergere, Mr. Harris Hammond, Edna M. Wallace, Willard W. Wallace, and two other persons—a man and wife who were unknown to me.

Q. You may resume the stand. That is all. [359]

Cross Examination

By Mr. Hedges:

Q. Mr. Wilson, you said you made the arrangements for having this D-8 bulldozer and carry-all come out to the property, is that correct? A. Yes, sir.

Q. And you gave me the man's name that owned the bulldozer. I have forgotten it now.

A. Mr. Rex Igle.

Q. Was he the operator of the bulldozer that performed the work?

A. Yes, he owned and operated it.

Q. What rate did he charge for the use of the bulldozer and his services?

Mr. Painter: Object to that as not proper cross examination. It is irrelevant and immaterial.

The Court: I don't think he testified to costs except merely the reasonable value.

(Testimony of William E. Wilson)

Mr. Hedges: But he testified to the value of moving this dirt at a dollar and a half a yard and it must be based upon what the bulldozer cost.

Mr. Painter: Not what the bulldozer cost.

Mr. Hedges: The rate for its use.

The Court: I will sustain the objection.

Q. By Mr. Hedges: Upon what do you base your opinion [360] that it cost \$1.50 a yard to move the dirt in this area, Mr. Wilson?

A. There were two bases. After you have moved dirt in an area and you know precisely what the costs are you would be in a better position to estimate than before, but in an area where the composition of the soil is unknown and where you are so far from transportation as you were there, sixteen and a half miles from Brawley, if I had gone on the property as a contractor, in the area, I would have undertaken the task of moving the amount of dirt that was moved here, very small in point of fact, for \$1.50 a yard. There would have been a reasonable profit margin in that. I was asked what in my opinion, was the worth of moving that dirt.

Q. Yes, and I am asking you upon what you based that.

A. That is what I based it upon, the isolation of the area, the unknown obstacles that might be involved, and so forth.

Q. Well, you would take into consideration the cost of the use of the bulldozer and the cost of the labor necessary to operate it, would you not?

A. That is right. Hand labor in that area, for example, a man, a good man with a shovel will move approximately three yards of material in an 8-hour day

(Testimony of William E. Wilson)

and that would run right close to \$3.00 a yard on that basis, on the hand basis. [361]

Q. Isn't it a fact that a man and a bulldozer can move the quantity of material that you testified to here for 50 cents a yard?

A. That is true under certain conditions.

Q. Is it not true at this particular location?

A. I think that it could be done.

Q. You don't know whether or not it was done for that price?

A. I don't know because I didn't handle those transactions.

Q. You did not handle the payment?

A. No, that is right.

Mr. Hedges: That is all.

Q. By Mr. Wood: Mr. Wilson, did Mr. Igle do this pursuant to a contract?

Mr. Painter: Object to that as not proper cross examination.

The Court: Objection sustained. This man does not know about that. He is merely the engineer who laid out the work to be done.

Q. By Mr. Wood: Did you survey the holes that were dug after the job was completed, Mr. Wilson?

A. No, my survey determined the location of these pits in the beginning and it was the first work that was done and after the survey was completed and the stakes were [362] driven then Mr. Igle and his driver were taken to the location and started on the work. I stayed there throughout the development of the work and didn't at any time allow the center line to be moved or disturbed.

(Testimony of William E. Wilson)

Q. And were there any other men working there besides Mr. Igle and his driver?

A. There was no other men working on the project besides Mr. Igle and his driver.

Q. After the work was completed by Mr. Igle and his driver, you did not measure it up?

A. Oh, yes, I measured it continuously because I was following the carry-all and the bulldozer through the cut, continuously observing the formation and stopping the depth when it had attained the proper depth. I would be at all times measuring as the work progressed.

Q. Did you have notes of those measurements?

A. Pardon me?

Q. Did you make notes of the measurements?

A. I made notes of them at the time. I don't have them with me now.

Q. What did you do with them?

A. My notes are in a field book that is in evidence in a lawsuit between Colonel E. A. Willsey and Mr. J. T. Boyd, an engineer, a mining engineer from Old Mexico that was tried before the Superior Court in San Francisco on [363] September 20th, 1946, and they are in evidence there and I couldn't get them out to bring them south.

Q. When did you last review those notes?

A. I haven't reviewed those notes since I left the desert.

Mr. Wood: That is all.

The Court: We will take a short recess, gentlemen, before you call your next witness.

(Short recess.)

The Court: You may proceed.

WILLARD W. WALLACE,

called as a witness by and on behalf of the defendants, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination

By Mr. Painter:

Q. At this time may the record show I am recalling Willard Wallace?

The Court: All right.

Mr. Painter: At this time, if your Honor please, I wish to introduce in evidence Defendants' Exhibits A to P, both inclusive, which have heretofore been marked for identification.

Mr. Hedges: To which we object, if your Honor please, upon the ground that they are absolutely void under the [364] provisions of Section 2313 of the Public Resources Code in that they do not carry on the reverse side—the first point is they are on a Colorado form and secondly, they do not conform to the statute which requires that there must be a statement on the back of the markings and the boundaries and the performance of the required discovery work, or the discovery work must be filed—another statement must be filed concurrently with the filing of the notice.

Mr. Painter: It isn't for that purpose I am introducing them, your Honor. The purpose I am introducing them for is in my chain to show that the notices posted on the property were in form, the same as those exhibits

(Testimony of Willard W. Wallace)

we have heretofore had the testimony of the witnesses as to contents of this and the other group of 16 which were posted on the property, and this is simply to have in evidence something which is a duplicate of notices which were on the property. A notice alone is not effective.

I am following that up with another series of exhibits which were filed.

Mr. Hedges: One further objection, if I might make it at this time, your Honor, and that is they show on the face that they were recorded at 10:00 o'clock a.m. on the 7th of September, which was prior in time to the actual location of the claims on the property.

Mr. Painter: I just got through saying, your Honor, I [365] was not asking them to be introduced in evidence for the purpose of showing that we complied with any statute, other than that we have in evidence a duplicate of that which was posted on the property for which we have the oral testimony of the witnesses.

The Court: If they are offered for that purpose and not as proper location certificates, properly recorded, in conformity with the statute, I think I will overrule the objection.

The Clerk: Defendants' Exhibits A to P, inclusive, are received in evidence.

(The documents previously marked as Defendants' Exhibits A to P, inclusive, were received in evidence.)

[DEFENDANTS' EXHIBIT A]

LOCATION CERTIFICATE

Placer Claim

Know All Men By These Presents, That We, the undersigned citizens of the United States, having complied with the provisions of Chapter 6, Title XXXII, of the Revised Statutes of the United States, and with the local customs, laws and regulations, claim by right of discovery and location, as a placer claim, the following described premises, situate, lying and being in Unorganized Mining District, County of Imperial, and State of California, to-wit:

The Gunnison No. 2 Placer Claim, being the Northwest $\frac{1}{4}$, Section 20, Township 14 South, Range 12 East, S.B.B.M. consisting of 160 Acres.

Discovered and located September 7th 1945.

Attest:

Harris Hammond

Edna M. Wallace

A. L. Bergere

James P. Delaney

J. C. Bergere

Mary J. Delaney

Willard W. Wallace

Irvin S. Barthel

When recorded, please mail this Instrument to
J. C. Bergere
208 W. 8th St., Rm. 405
Los Angeles, California

Recorded Sep 7 - 1945 10 A. M. in Book 624 Page
204 Official Records Imperial County, Calif.

At Request of

Grantee..... Grantor..... Trustee.....

Mortgagee..... Mortgagor.....

J. C. Bergere

(Defendants' Exhibit A)

Sheriff..... Attorney..... Locator.....

Evalyn B. Westerfield, County Recorder By Vera
Rogers Deputy

I certify that I have correctly transcribed this document in above mentioned book. K. Carter Copyist

\$1.00 Indexed Compared Book & Paged

Case No. 6105-Y Civ. Hattie M. Houck vs. J. A. Jose et al. Deft. Exhibit A. Date Jun. 4, 1947. No. A Identification. Date Jun. 5, 1947. No. A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. John A. Childress, Deputy Clerk.

[Clerk's Note: Counsel stipulate Exhibits B-P, inclusive, are similar to Exhibit A, save and except as hereinafter set forth:

Each of said Notices of Location contain the name of the claim involved, its correct legal description, and the book and page in which said Notice of Location was recorded in the Office of the County Recorder of Imperial County, California. No statement of assessment work done is contained in either of said Notices of Location.]

The Court: They are limited to the purpose indicated.

Q. By Mr. Painter: Mr. Wallace, I am handing you 16 pieces of paper and ask you if you have ever seen those before? A. I have.

Q. And were those prepared by you?

A. They were.

Q. Are the signatures which appear on each one of those claims in the handwriting of the defendants Hammond, et al.? A. Yes, they are. [366]

(Testimony of Willard W. Wallace)

Q. From what source did you get the information contained on each one of those pieces of paper, commencing with the word "Statement" and ending with the figures "1945"? A. From Mr. Wilson.

Q. That is Mr. Wilson who testified here on the stand? A. That is right.

Mr. Painter: At this time I offer in evidence these 16 amended notices of location of placer claims as Defendant Hammond et al. exhibits next in order.

Mr. Hedges: To which we object on the ground the instruments are incompetent, irrelevant and immaterial for the reason that they are intervening claims that have been filed between the time of the original location notice and the time of the filing of this amended claim.

The Court: Gentlemen, I will have to determine the validity of the conflicting claims here. Some of them depend upon time and I believe so long as I am hearing the matter on its merits I think it best to have them before me and then determine their legal effect later on.

The Code provides that the recordation of the notice may be within 90 days after the posting of the notice, so it is a question of law to determine what effect an intervening right has. If a man has 90 days after posting the question arises whether a man can deprive him of that right by running in and recording an instrument within the [367] 90-day period.

Mr. Hedges: I think the question, your Honor, is whether or not this being entitled an amended notice, whether or not it would revert back to the time of the filing of their first notice on the 7th, which it would, unless there were intervening rights which are the circumstances here.

(Testimony of Willard W. Wallace)

The Court: Well, I will overrule the objection. They may be received and given the proper numbers.

The Clerk: These are admitted as Exhibits No. 1 to 16.

Mr. Wood: No, there is no use running the numbers up.

Mr. Painter: One number as far as I am concerned is all right.

The Court: Have you given them numbers yet?

The Clerk: No.

The Court: Make them one number.

The Clerk: Then that is Defendants' Exhibit KK in evidence.

(The documents referred to were marked as Defendants' Exhibit KK, and was received in evidence.)

[DEFENDANTS' EXHIBIT KK]

AMENDED NOTICE OF LOCATION OF PLACER
CLAIM

Know All Men By These Presents, That We, the undersigned citizens of the United States, having complied with the provisions of Chapter 6, Title XXXII, of the Revised Statutes of the United States, and with the local customs, laws and regulations, claim by right of discovery and location, as a Placer Claim, the following described premises, situate, lying and being in Unorganized Mining District, County of Imperial, and State of California, to-wit:

The Gunnison No. 1, Placer Claim, being the Northeast $\frac{1}{4}$, Section 20, Township 14 South, Range 12 East, S.B.B.M. consisting of 160 Acres. Located September 7,

(Defendants' Exhibit KK)

1945. The date of the discovery and posting of the original notice of location is September 7, 1945.

STATEMENT OF MARKINGS AND BOUNDARIES

The markings of the boundaries of the aforesaid claim have been dispensed with since the claim has been located and described by legal subdivisions conforming to the United States General Land Office Survey of 1912.

STATEMENT OF DISCOVERY WORK PERFORMED

The Locators have performed all discovery work required by the laws of the United States and the State of California particularly Section 2305 of the Public Resources Code of the State of California by open cut work from which cut there has been removed more than 60 cubic yards of material and performing thereby at least One Dollar's (\$1.00) worth of work for each acre included in the claim.

The discovery work indicated *avoce* has been completed within 90 days from the date of location of said claim, namely: before 5 o'clock P.M. November 10, 1945.

Attest:

Harris Hammond

A. L. Bergere

J. C. Bergere

Willard W. Wallace

Edna M. Wallace

James P. Delaney

Mary J. Delaney

Irvin S. Barthel

J. C. Bergere

724 South Spring Street

Suite 515

Los Angeles 14, Calif.

(Defendants' Exhibit KK)

Recorded Nov 24, 1945 9 A.M. in Book 624 Page
237 Official Records Imperial County, Calif.

At Request of

Grantee..... Grantor..... Trustee.....

Mortgagee..... Mortgagor.....

J. C. Bergere

Sheriff..... Attorney..... Locator.....

Evalyn B. Westerfield, County Recorder By Vera Rogers
Deputy

I certify that I have correctly transcribed this document
in above mentioned book. Jo Stevens Copyist

\$1.00 Indexed Compared

Case No. 6105-Y Civ. Hattie M. Houck vs. J. A. Jose
et al. Defts. Exhibit KK. Date Jun 5, 1947. No. KK in
Evidence. Clerk, U. S. District Court, Sou. Dist. of
Calif. John A. Childress, Deputy Clerk.

[Clerk's Note: Counsel stipulate that each of said
pages of said Exhibit KK shall be considered duplicates
of the first page of said Exhibit, save and except as here-
inafter set forth:

Each of said Amended Notices of Location contain the
name of the claim involved, its correct legal description,
and the book and page in which said Notice of Location
was recorded in the Office of the County Recorder of Im-
perial County, California.]

Mr. Painter: That is all of Mr. Wallace.

Mr. Hedges: No cross examination.

Mr. Wood: No cross examination.

The Court: Call your next witness.

Mr. Painter: Mr. Hammond. [368]

HARRIS HAMMOND,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Harris Hammond.

Direct Examination

By Mr. Painter:

Q. Mr. Hammond, where do you reside?

A. Los Angeles.

Q. Are you acquainted with Mr. Lewis here in the courtroom? A. Yes.

Q. When did you first meet him?

A. In the spring of 1942.

Q. As a result of that meeting in the spring of 1942 were certain instruments drawn with reference to the property involved in this matter?

A. Yes, there were.

Q. I am going to show you what purports to be a lease between Ella Jackman, et al. and Stanley Houck as trustee, under date of September 12th, 1942, and ask you after examining that instrument, if you could tell me approximately how many weeks prior to the date of that instrument was it that you first met Mr. Lewis? [369]

A. I would say about four months.

Q. Now, where did you first meet Mr. Lewis?

A. In my office at the Union Oil Building.

Q. Did you have any conversation with Mr. Lewis at that time in which there was any discussion as to the property involved in this action? Just answer that yes or no. A. Yes.

(Testimony of Harris Hammond)

Q. Did you have more than one discussion with Mr. Lewis in relation to that same subject between the date of your first meeting and this date, September 12th, 1942?

A. Yes, we had quite a few.

Q. Now, will you give me the substance of the first discussion which you and Mr. Lewis had in relation to this property?

Mr. Hedges: Just a minute. I cannot see the materiality of this line of examination if your Honor please, and object to it upon that ground. If counsel will disclose what he has in mind perhaps I can withdraw the objection.

Mr. Painter: I assume it would be proper at this time if the court desires me to do so.

The Court: Surely.

Mr. Painter: At this time, if your Honor please, I am going to endeavor to prove that in the late spring of 1942 or early summer of 1942, Mr. Hammond was approached by Mr. [370] Lewis and was advised by Mr. Lewis, in substance, that he, Mr. Lewis, had an option to obtain a lease on this property from a Mr. Jose; that as a result of that conference he interested Mr. Hammond in going forward with the transaction by which he and Mr. Lewis were to acquire such a leasehold interest; that he represented to Mr. Hammond at that time that Mr. Jose and others associated with him, were the owner of mining claims on this property and that the property contained valuable mineral deposits. That subsequent thereto and through the offices of Mr. Lewis, Mr. Lewis introduced to Mr. Hammond an attorney from Minneapolis by the name of Stanley B. Houck; that after conferences between Stanley B. Houck, Mr.

Lewis and Mr. Hammond, the three parties entered into an agreement under which Mr. Houck was to obtain, through the option which Mr. Lewis had, a lease on the property here involved, the lessee to be Stanley Houck as trustee for the benefit of Mr. Lewis, Mr. Hammond and Mr. Houck.

That at that time Mr. Hammond employed Mr. Houck as his attorney to represent him in the transaction, first for the purpose of securing a valid lease on the property from the proper parties and that a part of his consideration was the conveyance to him by Mr. Lewis and Mr. Hammond a two and a half per cent interest in this lease which was to be obtained.

That subsequent thereto Mr. Houck took in his name [371] such a lease under the date of September 12th, 1942. That Mr. Hammond was at a later date advised by Mr. Stanley B. Houck, who, by the way, is the plaintiff Stanley B. Houck in this action, that he, Mr. Houck, had found that there were defects in the title.

Mr. Houck's opinion as an attorney, was that a new lease should be drawn—first, that there was—a modification should be drawn and later that a new lease should be drawn and that the names of the lessors be obtained to the lease whom, in Mr. Houck's opinion, it was necessary to have on the lease to make it a valid lease.

Such a lease was obtained under date of December 1, 1942. That this new lease was obtained in the first of February or first of December, 1942, and was obtained in the name of Mr. Houck as trustee for the benefit of Mr. Hammond, Mr. Lewis, and himself.

That subsequent thereto, through the advise and counsel of Mr. Houck, Mr. and Mrs. Hammond entered into a trust agreement in which Mr. Houck was named as

the trustee, conveying to him as trustee for the benefit of certain of the kin of Mr. and Mrs. Hammond, a two and a half per cent interest in the lease in addition to the one in the agreement which he was to have the benefit of.

That subsequent thereto and through the counsel of Mr. Houck as attorney for Mr. Hammond, he prepared a [372] declaration of the trust under which he was holding this property and that declaration was signed by Mr. Houck as the trustee and individually by Mr. Lewis and by Mr. Hammond.

That in that trust the division of the interests in the leasehold created by the lease from Jose, et al. to Houck as trustee, were divided between Mr. Hammond 45 per cent, Mr. Lewis 45 per cent, and Mr. Houck and his wife, two and a half per cent each.

That as of the date Mr. Houck endeavored to post claims on this property that trust was still in existence and that the relationship of attorney and client had never been terminated in connection with this matter.

Now, the whole theory back of that, if your Honor please, is the theory that Mr. Houck, acting as trustee and as an attorney, had created a confidential relationship, fiduciary relationship between himself and Mr. Hammond, and that he could not and cannot come into this court and endeavor to take advantage of a deficiency in the interests which he, Mr. Houck, was duty-bound to obtain for Mr. Hammond.

I will further show that pursuant to the advise and counsel of Mr. Houck and relying upon the representations that he was representing himself as an attorney, Mr. Hammond expended out of his own personal funds in excess of \$25,000 for the development of this project. [373]

That is the theory back of this evidence.

Mr. Hedges: To which we object, if your Honor please, upon the ground it is wholly incompetent, irrelevant and immaterial. It is too remote. It is not within any of the issues of this case. It has not been raised as a defense. Has no bearing on the issues involved here at all. It is ancient history that Mr. Painter is talking about. This case starts as of the 6th of September, 1945. He is talking away back in 1942 sometime and no issue of that is raised in any of the pleadings.

The Court: Mr. Wood, have you any comment?

Mr. Wood: No.

The Court: If that property had been acquired and it had been agreed among the parties that it should be put in the form of a trust and the proceeds divided in a certain manner, I would hold that under the broad terms of an action to quiet title, you can establish almost any interest, but what you are trying to establish here is a breach of a fiduciary relationship ante-dating a claim of title.

You have not filed a cross claim on that basis.

It is too late at the present time to go into a question that would require me to determine whether, in acquiring this property, he broke a fiduciary relation and if he did break a fiduciary relation the proper remedy would be an action for damages. [374]

Mr. Painter: I will elucidate on my theory. The theory upon which this is being introduced is that at any time in an equitable proceeding the court has a right to determine whether a party litigant is coming into court with clean hands.

The Court: But it must be pleaded. What you are trying to do is show a breach of fiduciary relations. In the first place, I question whether on unpatented land you can bring suit to quiet title to a mining claim in the

first place. What you are trying to do is quiet title to land that is still in the public domain. You are merely making a claim to it. You cannot acquire a patent for 20 years. All that I would decide is not that you have title to the lands but that you have a prior claim. That is about all I decide in a mining claim, because at any time you fail to do your assessment work you forfeit your right and anybody may go in and re-enter on the land and your locations mean very little.

We are not dealing here with a fee simple title in anybody. You are dealing with what we know as a typical mining gamble into which a lot of people enter and I cannot see how the relations of this defendant to the plaintiff, prior thereto, before any claim is asserted here by which he acquired nothing—nobody had any claim in 1942. This land was not open to entry. You could not make a valid [375] contract to it that could be enforced in law because you are merely speculating on when the war would end and the Government would withdraw the interdict and the land put back in circulation.

So, I cannot see, assuming everything you say is true, how that question is before me. It is not pleaded and I doubt if it had been pleaded that I could have entertained it because it purely relates to a speculative venture into which you entered at a time when no rights could be acquired to this property. Not only was it withdrawn but it was preempted and was being used as a part of the desert center, I think it was called.

Mr. Wood: A firing range.

The Court: A firing range.

Your contract does not relate to any of the rights which any of you three now assert. Each of you three

groups assert rights under placer claims made the moment the withdrawal notice became effective, 63 days after July 6th.

Mr. Painter: Of course I went on the premise, if your Honor please, this was an equitable proceeding. Maybe I am in error.

The Court: To some extent a suit to quiet title is an equity proceeding, but you cannot thresh out anything but the question of title. You cannot thresh out damage suits with relation to property as to which no one had any rights in [376] 1942. You couldn't acquire any rights to this property then.

Merely because you knew it was there didn't give you a right to speculate about it. If you did and you made a trust as to property which you had no title to, it is outside of the province of this case.

Furthermore, assuming it had been it should have been pleaded. A defense like this isn't a defense of clean hands. This is what you are trying to do, make him a trustee—

Mr. Painter: No, I am not, your Honor. That is not the purpose of the introduction of this evidence. The purpose of the introduction of this evidence is simply in support of the theory that the court in an equitable proceeding will not let one who is a trustee and stands in a confidential relationship with one of the parties, take advantage of a wrong which he has created himself to his own advantage, and he is not coming into court with clean hands and asserting a right against Mr. Hammond which is founded in justice and equity.

The Court: I do not think it is an issue in an ordinary suit to quiet title, especially in a suit of this character which relates to mining property, as to which only provisional rights are acquired by anybody.

It should have been pleaded before this. It is too [377] late to bring it up at the present time.

Furthermore, assuming it had been pleaded, I doubt if I could entertain it because no rights could have been acquired by anybody as to this land while it was a part of the public domain and was withdrawn from entry and in the hands of the War Department. For that reason there is no equity matter before the court.

Mr. Painter: I will submit to your Honor's opinion and question Mr. Hammond no further.

The Court: All right.

Mr. Hedges: No questions.

The Court: The objection is sustained.

Mr. Painter: May we have just one minute, your Honor? I think we are ready to rest.

The Court: All right.

Mr. Painter: That is our last witness, your Honor. Might we have this understanding, however? I would like to consider further this last point that I made. I am quite sure I have presented all the points to your Honor.

The Court: Have you additional testimony, Mr. Wood?

Mr. Wood: Yes, your Honor, I have three more witnesses.

The Court: All right, call your next witness. [378]

WAYNE HODGSON,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Mr. Wood: If your Honor please, at the adjournment of court at noon Mr. Hodgson came to me and told me that he wanted to re-take the witness stand; that he had listened to some of the testimony that had been given here and that he felt he owed an obligation to this court to come in and tell the court what he knew about the facts. I told him if he remained over that I would put him on the witness stand.

The Court: Well, I cannot allow him to go on indefinitely telling what he knows. You will have to ask him questions relating to any matter that he either testified to or any matters by other witnesses.

Mr. Wood: I will put the questions, but he wanted me to explain why he wanted to come back.

The Court: That is all right.

Mr. Hedges: Are you calling him as your own witness, Mr. Wood?

Mr. Wood: I am.

Direct Examination

By Mr. Wood:

Q. Mr. Hodgson, you were employed as you testified in this case, by Mr. Lewis in connection with some work on [379] the property in question?

A. That is right.

Q. And when were you first employed by Mr. Lewis?

A. I believe I was first employed by Mr. Lewis on the morning of September 6th, 1945.

(Testimony of Wayne Hodgson)

Q. Now, after the location work was done, that is the location notices were posted on the 6th and 7th of September, 1945, were you again employed by Mr. Lewis?

A. That is correct.

Q. And when was that, Mr. Hodgson?

A. That was in the month in question, in November, I believe.

Q. In November of 1945?

A. I believe that is correct, yes.

Q. And where did that employment take place?

A. He came to my home.

Q. And that is in Imperial?

A. Imperial, California.

Q. And you had a conversation with him at that time?

A. Yes.

Q. Who was present?

A. My family—my mother and my father and I believe my brother.

Q. What was that conversation—what was said?

A. The text of the conversation was that he would give [380] me a certain sum of money to hire a certain sum of boys around 12, to go out onto said property in question and dig two holes amounting to excavation and assessment work on said quarter sections.

Q. How much money did he say he would give you?

A. At that time he said he would give me \$50.00 for that one day. However, it was my understanding—it was the understanding of my folks—I thought it was an exorbitant price.

Mr. Hedges: We object to what he thought and what his folks thought and move it be stricken.

(Testimony of Wayne Hodgson)

The Witness: He said he would give me \$50.00 to go out on the desert and dig a hole.

Q. By Mr. Wood: What did you do after that with respect to this particular project?

A. I hired 12 boys.

Q. You hired the boys?

A. I engaged them. I didn't exactly hire them. I acquired them and they were under the employ of myself and Mr. Lewis.

Q. And you went out on the desert?

A. That is correct.

Q. Now, did you dig a hole with those boys out there?

A. I did.

Q. On what quarter section was that? [381]

A. That was on—if I may step down, please?

The Court: Yes, go ahead.

A. That was on Torrid No. 1 and Temperate No. 2.

Q. By Mr. Wood: Which hole was dug first?

A. They were both started on Saturday. I split the boys up. One worked on Torrid No. 1. That was one bunch of boys which amounted to six boys. I am fairly sure of that—five or six. Not over six and not under five.

And then I took the other six boys and took them down to Temperate No. 2 and there we worked Saturday for nine and one-half hours, I believe.

Mr. Hedges: If your Honor please, I haven't the slightest idea what Mr. Wood is attempting to develop here, but this witness is testifying to things that he testified to yesterday and it seems to me to be strictly repetitious.

The Court: As to dates he already testified to this.

(Testimony of Wayne Hodgson)

Mr. Wood: I am leading up to where he wants to make a change, your Honor.

The Court: He wants to make a change? All right, go ahead.

Q. By Mr. Wood: How many days did you work on those two holes, Mr. Hodgson?

A. I worked on those two holes for two days.

Q. And approximately how many hours a day?

A. Nine and one-half. [382]

Q. Each day? A. Each day.

Q. Now, did you do any further work for Mr. Lewis there? A. Not on those two holes.

Q. I mean in any other capacity?

A. Yes. I acted in the capacity of rather a foreman over possibly 30 or 40 Mexicans that were working for Mr. Lewis at that time.

Q. And was that after you had dug these two holes?

A. That is correct.

Q. For how many days were you there with him during that period of time?

A. Approximately three days.

Q. During that period of time did you have any conversations with Mr. Lewis with respect to any of the holes that were being dug?

A. Yes, that were being dug, yes.

Q. Who was present beside you and Mr. Lewis?

A. Myself and the Mexican laborers is all.

Q. What were those conversations?

Mr. Hedges: Just a minute. May we have a little better foundation as to time?

The Court: Yes, let us have some definite idea about dates. [383]

(Testimony of Wayne Hodgson)

Q. By Mr. Wood: Do you remember what dates they were on?

A. Yes. That was a Monday following the Saturday and Sunday that I worked in the latter part of November. These conversations took place during the time Mr. Lewis was doing the assessment work on the property.

The Court: All right.

Q. By Mr. Wood: And what conversations did you have with him?

A. Well, I had various conversations with him pertaining to digging the holes, how long to work on them.

Q. Tell the court what he told you to do and what was said there?

Mr. Hedges: I haven't any objection to the conversations, but I thought you put him on the stand for the purpose of correcting some testimony. I haven't seen any of it yet.

Mr. Wood: I put him on the stand for him to testify as to what he did out there, what conversations he had with Mr. Lewis as to the development work that Mr. Lewis did on this property.

Mr. Hedges: He is your witness.

The Court: I will reserve your motion to strike. I don't know what it is leading to.

The Witness: May I ask a question, your Honor?

The Court: No, I am not answering questions. You want- [384] ed to correct some testimony.

The Witness: I want to correct some testimony in this court that I heard that was false.

Q. By Mr. Wood: You tell what he said to you.

A. All right, he said—

Mr. Hedges: Who are you referring to?

(Testimony of Wayne Hodgson)

The Witness: Mr. Lewis told me in relationship to the holes, especially on Temperate No. 1, on which I worked there for one day with the six boys. We hit hard dirt and his actual conversation to me was this, and I say this in all truthfulness—

The Court: Go ahead; don't give us an explanation.

The Witness: Anyway, he said, "We have hit hard dirt. They will never be able to check how much money we spent here. Call off your boys," and I did.

The Court: All right.

Q. By Mr. Wood: Did you have any further conversations with him with reference to these matters?

A. With that conversation pertaining to several of the holes on the property, but I cannot be specific as to what amount—as to what holes.

The Court: Well, when you struck hard dirt you went on to the others, didn't you?

The Witness: That is correct.

The Court: All right. [385]

Q. By Mr. Wood: Now, were you present at any time when the Mexican laborers were paid off on this property? A. I was.

Q. And when was that?

A. That was in the latter part of November. It was on—I forget exactly what day but I was present at the time they paid the Mexicans off for the whole work—I mean when the Mexicans pulled out and left. I was present when Mr. Lewis settled up his account with them.

Q. Where did that take place?

A. That took place in front of the Safeway Store in Brawley at seven o'clock at night.

(Testimony of Wayne Hodgson)

Q. And how was that handled?

A. That was handled by Mr. Lewis holding a time-book and I believe the money, checking off how much money each Mexican had made and handing me the cash and I in turn handing it to the Mexican.

Mr. Wood: That is all.

Cross-Examination

By Mr. Hedges:

Q. Mr. Hodgson, you did not tell me anything about this yesterday, did you? A. You didn't ask me.

Q. As to what you just testified now?

A. You didn't ask me. [386]

Q. What prompted you all of a sudden to want to testify to these things which you could have testified to yesterday? A. You want me to tell you?

Q. Yes, I am asking you.

A. I will tell you, all right, because I set back there and heard some outlandish lies by a certain person in this courtroom. I knew they were lies. My opinion of this person isn't very high. I mean, he has lied to me constantly, and I thought if there was anything I could do for it—I will say this to you and the court, I cannot be unbiased in this, but what I am saying is the truth and I planned to say it when I come up here.

The Court: All right.

The Witness: And that is what prompted me to say it.

Mr. Hedges: Very well, no further questions, your Honor.

The Court: All right, step down. You have gotten it off your chest. I hope you feel better.

(Testimony of Wayne Hodgson)

The Witness: I do.

Mr. Wood: May I speak to your Honor for just a second off the record?

The Court: Yes.

(Discussion off the record.)

The Court: We will recess at this time until 2:00 [387] o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was had until 2:00 o'clock p.m. of the same day.) [388]

Los Angeles, California, Thursday, June 5, 1947.
2:00 P. M.

The Court: All right, gentlemen, you may proceed.

JOSEPH F. GOLDEN,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Joseph F. Golden.

Direct Examination

By Mr. Wood:

Q. What is your business or occupation?

A. I am a registered civil engineer.

Mr. Painter: If I may interrupt for a moment, the defendants and cross complaints, et al. rest.

The Court: All right, you may proceed, Mr. Wood.

Q. By Mr. Wood: What is your occupation?

A. I am a registered civil engineer.

(Testimony of Joseph F. Golden)

Q. And where is your office?

A. El Centro, California.

Q. How long have you been an engineer in the Imperial Valley? A. 17 years.

Q. Are you familiar with the property—

A. I am. [389]

Q. Described as Sections 20, 21, 28 and 29?

A. I am.

Q. In Township 14? A. I am.

Q. Have you been on that property, Mr. Golden?

A. Yes, I have.

Q. And when were you first on the property?

A. First on the property?

Q. In connection with making a survey?

A. In connection with this case in April, 1946.

Q. And at that time did you make a survey of those four sections? A. I did.

Q. I show you a map, Mr. Golden, which appears to be certified by you, and directing your attention to the upper left-hand corner, was that map made by you?

A. It was made under my direction.

Q. And that represents, in the upper left-hand corner, the four sections here involved?

A. That is correct.

Q. And on the left-hand side the sketch is marked from 1 to 16, inclusive. Can you tell us what that represents?

A. 1 to 17, inclusive. It is sketches showing the extent of excavations that were made by Mr. Bratton and [390] Mr. Sturgis of El Centro that I measured and these sketches are reproductions of the field survey that I made to determine the extent and yardage of these excavations.

(Testimony of Joseph F. Golden)

Q. Now, directing your attention to the square sketches that are on there marked from 1 to 16, what do they represent?

A. Well, they represent my measurements of excavations that were made by others—others than Bratton and Sturgis on these same properties.

Mr. Wood: May we have this marked for identification, your Honor?

The Court: Marked for identification defendants' Exhibits LL.

(The documents referred to were marked as Defendants' Exhibits LL, and were received in evidence.)

Q. By Mr. Wood: Now, in setting out these four sections, Mr. Golden, did you run a survey there?

A. Yes, I did.

Q. And will you tell us what you did in order to arrive at the exterior boundaries of those four sections?

A. Well, most of the original general Land Office corners were still in existence so it wasn't necessary for me to retrace the exterior boundaries of the sections, except in the case of the south line of Section 20, I believe it is, in order to divide the quarter sections. It [391] was necessary to have the south quarter section corner of Section 20, which apparently had been destroyed or removed, so it became necessary for me to re-establish that, which I did, by running a line between the southwest and southeast corner of that section, and determining the distance, and re-establishing the quarter section corner in accordance with law, at a point midway between those two corners and I established as a monument a .50-caliber machine gun barrel at that point and when I had estab-

(Testimony of Joseph F. Golden)

lished that quarter corner, south quarter corner of Section 20, I turned an angle that would, from that quarter corner that would throw me parallel to the east and west lines of that section and measured a half mile due north and south in order to—and I also went through that same procedure on the other two sections, except that it wasn't necessary for me to re-establish any corners there, the original Government corner being in existence.

In effect, what I did was to establish the approximate center of the four sections that are involved so that I could determine whether or not the work that was done in the location of these holes fell wholly within any one quarter section or not. And I ran this survey with sufficient accuracy to satisfy myself that such was the case.

Q. Now, did you find that the holes were in their [392] proper quarter sections?

A. Yes, they were.

Q. That is, both the holes that were dug by Mr. Bratton?

A. Well, the holes that were dug by Mr. Bratton were dug to stakes that I had previously set to insure that they would be on the proper quarter section. In other words, I was there prior to the time that he commenced operations and set stakes to guide him, marking the spot where he was to make his excavation and all of the other holes that I measured are in the proper quarter section that they are referred to on the tabulation shown on that map.

Q. So that the holes that were dug by Mr. Bratton and the other holes marked 1 to 16, were in their proper quarter sections?

A. That is correct.

(Testimony of Joseph F. Golden)

Q. Now, when Mr. Bratton finished his work there did you measure the holes that he had dug? A. I did.

Q. And did you calculate the yardage removed?

A. I did.

Q. Now, will you take this point and start with No. 1 hole, telling us what quarter sections they are in, Mr. Golden, and give us the dimensions of the hole itself, the depth and the cubic yardage removed? I am asking a compound [393] question to save time, if it is all right with the court.

A. Hole No. 1 is located in the Northeast Quarter of Section 28. This hole measured approximately 75 feet wide by 90 feet long with very nearly vertical sides and I measured the depth on all of these excavations. I measured the depth at every change or break in the ground. In other words, I resolved the shape of all these holes into fundamental geometrical shapes so we could calculate the yardage and I referred all of the elevations that are shown on this sketch to the ground surface at the highest point of the rim. And this hole with respect to the high point of the rim averaged, roughly, five feet deep and it was approximately flat on the bottom and somewhere near the center of this hole there was a shaft four feet by eight feet by almost 11 feet deep—10.8 feet deep.

My calculated yardage on that hole No. 1 was 1,150 cubic yards, approximately.

Q. Now take No. 2.

A. Hole No. 2 is located in the Northwest Quarter of Section 28 and there was an excavation about 35 by 62 feet, approximately vertical sides, and in the nature of five feet or so in depth with a shaft in the center of

(Testimony of Joseph F. Golden)

it that was $3\frac{1}{2}$ by $7\frac{1}{2}$ by $13\frac{1}{2}$ feet deep. I calculated the yardage on that hole No. 2 to be approximately 470 yards.

Q. Now, Hole No. 3? [394]

A. Hole No. 3 is located in the Southwest Quarter of Section 21. There was an excavation 74 feet by 100 feet and approximately 4 feet deep below the highest point in the rim, with a 5 by 9 by 11.8 foot depth of shaft in the middle, and approximately 1,400 cubic yards removed.

Q. Hole No. 4?

A. Hole No. 4 was located in the Southeast Quarter of Section 21. It was a hole 76 feet wide by 172 feet with approximately vertical sides and varying depths at the corners from 2 to 4 feet in depth, with a shaft in the approximate center that was $4\frac{1}{2}$ by $8\frac{1}{2}$ by 10.7 deep, and having approximately an excavated yardage of 1,760 yards.

Q. Hole No. 5?

A. Hole No. 5 was a wedge-shaped hole that was 82 feet wide by 57 feet across the top and varied in depth from nothing at the outside to approximately 15 or 16 feet at the center and having a yardage of approximately 370 yards. That hole, by the way, was located in the Northwest Quarter of Section 29.

Q. Now, Hole No. 6?

A. Hole No. 6 was an irregular wedge-shaped excavation about 55 feet by 90 feet and approximately 9 feet deep in the deepest portion, with a shaft in the deep portion 4 by 7 by 13 feet deep. That hole was located in the Southwest Quarter of Section 20 and had an excavated yardage of [395] about 450 cubic yards.

(Testimony of Joseph F. Golden)

Q. Hole No. 7?

A. Hole No. 7 was a rectangular excavation about 38 feet by 93 feet, located in the Southeast Quarter of Section 20, approximately 5 or 6 feet deep, running to as much as 11 feet deep in the extreme deepest corner and having an excavated yardage of about 865 yards.

Q. Hole No. 8?

A. Hole No. 8 was an irregular rectangular hole with wedge-shaped end and a prismoidal center portion of about, roughly, 170 feet long by about 40 feet wide with various depths indicated on the chart here, approximately 12 feet deep in the deepest portion. This hole is located in the Northeast Quarter of Section 29 and I calculated the yardage to be 1,750 yards.

Q. Now, Hole No. 9?

A. Hole No. 9 was an irregular wedge-shaped hole of approximately 90 feet by 25 feet, running to 12½ feet deep, located in the Northwest Quarter of Section 20, and having a calculated yardage of 630 yards.

Q. No. 10?

A. Hole No. 10 was approximately 110 feet long by 24 feet wide, various widths on the bottom as indicated on this chart, but running to almost 12 feet deep. It was located in the Northwest Quarter of Section 20. I calculated [396] the yardage to be about 645 yards.

Q. No. 11?

A. No. 11 is a wedge-shaped hole 84 feet by 23 feet, 14 feet at the deepest point. It is located in the Southwest Quarter of Section 29, and with a volume of 310 yards.

(Testimony of Joseph F. Golden)

Q. No. 12?

A. Hole No. 12 is a wedge-shaped hole approximately 13 feet deep, 92 feet by 92 feet wide, located in the Southeast Quarter of Section 29. The volume of cubic yards was 350.

Q. Hole No. 13?

A. No. 13 is an irregular shaped hole about 120 feet long by 20 feet wide and in the nature of 25 feet deep below the high corner. That hole is located in the Southeast Quarter of Section 28 with an excavated volume of 395 cubic yards.

Q. Hole No. 14?

A. Hole No. 14 was a wedge-shaped hole 15, or about 95 feet by 23 feet and 18 feet deep below the highest point on the rim. It was located in the Southwest Quarter of Section 28. Calculated volume of 435 yards.

Q. Now, Hole No. 15?

A. Hole 15 is a rectangular hole with wedge-shaped ends; in the nature of 14 feet deep. About 110 feet long by 24 feet wide. It is in the Northeast Quarter of Section [397] 21 and with a calculated yardage of 670 yards.

Q. Now, 16?

A. 16 was an irregular hole of approximately 12 feet deep, 110 feet by 34 feet wide, and located in the North-west Quarter of Section 21. There was a calculated volume of 885 yards.

Q. Hole No. 17?

A. Hole No. 17 was a rectangular, practically square hole, 24 by 24, of approximately four feet deep, located in the Southeast Quarter of Section 21, and it had a volume of approximately 75 yards.

(Testimony of Joseph F. Golden)

Q. Now, directing your attention to the remaining 16 holes that you found that are represented on that map, you found those in their respective quarter sections to which you have previously referred—each hole was in one quarter section, is that right?

A. That is correct.

Q. And did you measure those holes? A. I did.

Q. How did you do your measuring on those holes?

A. I took levels—I taped the dimension of the holes and took levels at all of the points, different points of elevation that would have to be considered. In other words, I took level shots at all breaks around the rim and all breaks around the bottom and from that I computed the [398] yardage, approximate yardage.

Q. Now, have you computed the yardage in the various holes on this map?

A. Yes. I indicate on the map the yardage that I calculated of material removed.

Q. Without giving the size of the holes—I do not think that is necessary and we can expedite it if it is agreeable with the court, but will you give us the number of the hole, the quarter section that it is in, and the yardage that you found?

Mr. Hedges: May I ask one question before he does that? May I ask him when he calculated this yardage insofar as it affects the plaintiffs' locations?

Q. By Mr. Wood: What date was that done?

A. That was shortly after the date—that was in April of 1946.

Mr. Hedges: April of 1946?

The Witness: That is right.

(Testimony of Joseph F. Golden)

Q. By Mr. Wood: Now, in calculating the yardage on those holes, Mr. Golden, did you find any of the holes to have sand in them? A. Oh, yes.

Q. And when you did that did you attempt to find the bottom of the hole?

A. Yes, I attempted insofar as possible to determine [399] the yardage that had been excavated and to not take into consideration the blow-sand that was in evidence there. In a number of cases it was just the corners of the hole that was blown away—blown in and it was pretty clear to see where the excavation had been made and all of my calculations are based on what I considered to be the excavation that had been made.

The Court: You made allowance for the sand that had blown into the hole?

The Witness: That is right, insofar as I was able to do so. We dug down to see where the material had blown in, where the nature of the material changed. It was easy enough to do that.

Q. By Mr. Wood: Now, in doing that will you give us the number of the hole, the quarter section it is in and the number of cubic yards that you found removed from that hole?

A. Hole No. 1, in the Northeast Quarter of Section 28, 73 cubic yards.

Hole No. 2, in the Northwest Quarter of Section 28, 74 cubic yards.

Hole No. 3, in the Southwest Quarter of Section 21, 71 cubic yards.

Hole No. 4, in the Southeast Corner of Section 21, 56 cubic yards.

(Testimony of Joseph F. Golden)

Hole No. 5, in the Northwest Quarter of Section 29, [400] 109 cubic yards.

Hole No. 6, in the Southwest Quarter of Section 20, 82 cubic yards.

Hole No. 7, in the Southeast Quarter of Section 20, 71 cubic yards.

Hole No. 8, in the Northeast Quarter of Section 29, 122 cubic yards.

Hole No. 9, in the Northwest Quarter of Section 20, 114 cubic yards.

Hole No. 10; I indicate on this map, this chart as not having been found by me at that time. That hole has subsequently been found and measured and it was found to have approximately 36 cubic yards.

Hole No. 11, in the Southwest Quarter of Section 29, 96 cubic yards.

Hole No. 12, in the Southeast Quarter of Section 29, 63 cubic yards.

Hole No. 13, in the Southeast Quarter of Section 28, 9 cubic yards.

Hole No. 14, in the Southwest Quarter of Section 28, 72 cubic yards.

Hole No. 15, in the Northeast Quarter of Section 21, 102 cubic yards.

Hole No. 16, in the Northwest Quarter of Section 21, 44 cubic yards. [401]

Q. If you will just take the stand again. Do you gentlemen want to look at this other map?

Mr. Painter: Yes.

Mr. Hedges: Yes.

(Testimony of Joseph F. Golden)

Q. By Mr. Wood: Mr. Golden, I show you another map in which appears in the upper left-hand corner the four sections—that is, Sections 20, 21, 29 and 28, and on which there are eight sketches. That map was made by you, was it not, Mr. Golden? A. That is correct.

Q. And the sketches numbered 1 to 8 were a survey made by you of those various workings on that property?

A. That is correct.

Q. And when was that made, Mr. Golden?

A. That was the survey—that survey was made on June 20th, 1946.

Q. Now, directing your attention to Sketch No. 1, which shows on this map as being the Northeast Quarter and the Northwest Quarter of Section 20 under the name of Gunnison 1 and 2, did you measure that hole?

A. I did.

Q. And what did you find the size of the hole to be?

Mr. Painter: I am going to object to that on the ground no foundation has been laid and on the further ground that it is too remote. [402]

The Court: The objection is overruled.

Mr. Painter: In other words, I understand they are endeavoring to prove here now, if your Honor please, that the work that we did was not sufficient as measured in June of 1946, the work having been done in November of 1945.

The Court: Your objection goes to the weight to be given the testimony rather than as to its admissibility?

Mr. Painter: I just wanted to point that matter out to the court.

(Testimony of Joseph F. Golden)

Q. By Mr. Wood: Will you examine Sketch No. 1 and tell us the size of the hole, Mr. Golden?

A. Well, the hole was a long, narrow trench with ramps at both ends and it had a ramp of approximately 25 feet on one end and 42 feet—that is, an inclined excavation on one end, and then the central portion of it was relatively flat. It was about 90 feet long by about 12 feet in width with practically vertical sides. It had a maximum depth of a little better than four feet at the deepest point, and I calculated the volume removed to be about 175 cubic yards.

Q. Now, in making that calculation and measuring that hole did you endeavor to go down to the bottom of the hole as nearly as you could tell, to the depth to which it was originally dug?

Mr. Painter: I object to that as asking for a conclusion and opinion of the witness. And I submit, if your [403] Honor please, that without the removing of the loose and shifting sands and dirt that are naturally blown in on a desert of this type, it would be utterly impossible for anybody to answer that question.

The Court: Your own engineer testified that this formation gets very hard. It shouldn't be difficult to distinguish drifting sand which blows over the desert from the clay below it. The objection is overruled.

Q. By Mr. Wood: Will you answer the question?

The Court: Read the question.

(Question read.)

A. Yes, that is right.

Q. By Mr. Wood: Did you do that on all the holes?

A. In every case I attempted to reconstruct as nearly as I could the original excavation and—

(Testimony of Joseph F. Golden)

Mr. Painter: I think the question has been answered, your Honor.

The Court: That is all right.

Mr. Painter: I object to the voluntary testimony of the witness.

The Court: That is not an objection in Federal Court.

The Witness: I will be glad to tell you that in some cases—

The Court: It doesn't make any difference whether it is given voluntarily or otherwise. [404]

The Witness: In some cases it was necessary to do a little shoveling up against the corners of the holes to determine it, but in most every case, especially on these holes, the bottoms were level from side to side as if they had been made with a carry-all and while the edges of the hole had fills of sand in them it was very easy to determine what the average level bottom of the hole was.

The Court: All right.

Q. By Mr. Wood: Now, on No. 2, which apparently shows on the map as being the Southeast Quarter and the Southwest Quarter of Section 20, known as Gunnison 3 and 4, what was the size of that excavation?

Mr. Painter: May it be understood I have an objection to each and every one of these questions without repeating the objection?

The Court: Yes.

The Witness: This was a long, narrow trench-like excavation with sloping ramps at each end; 36 feet on one end and 25 feet on the other, and relatively flat center section about 45 feet long. The extreme depth of the

(Testimony of Joseph F. Golden)

hole below the ground adjacent at the rim was about six and a half feet.

I calculated the yardage at 120 cubic yards.

Q. By Mr. Wood: Now, No. 3?

A. No. 3 had the same thing—the ramps sloping at [405] either end and approximately 25 feet long and a 46 foot long center section with a depth of six and a half feet, approximately. 175 cubic yards.

Q. Now, No. 4? I am sorry. I did not read “the Northeast Quarter and Northwest Quarter of Section 21 known as Platte 1 and 2.”

Now, on No. 4, which appears to be the Southeast Quarter and Southwest Quarter of Section 21, known as Platte 3 and 4, what was the size of that hole?

A. That hole had 40-foot sloping ramps on both ends and a 25-foot center section that was approximately eight feet deep. 100 cubic yards calculated.

Q. Now, No. 5, which appears to be the Northeast Quarter and the Northwest Quarter of Section 28, known as Silver Heels 1 and 2?

A. No. 5 had a 25-foot and a 30-foot incline on the ends, and a 50-foot center section that averaged approximately eight feet deep, and I calculated it at 220 cubic yards.

Q. Now, No. 6, which apparently appears to be the Southeast Quarter and Southwest Quarter of Section 28, described as Silver Heels Nos. 3 and 4. Will you tell us the size of that hole?

A. Well, that hole was just a very, very shallow excavation. As I recall, it was on the surface of very hard clay and it was a very, very shallow hole—averaged [406] from a half foot to a foot deep only. About 150 feet

(Testimony of Joseph F. Golden)

long and 12 feet wide, and I calculated the yardage at approximately 50 cubic yards. I might say the hole was very irregular and no attempt was made on that particular hole to determine it to a very fine point, the depths, other than they were not more than a foot deep at any point.

Q. Now, No. 7, which appears to be the Northeast Quarter and the Northwest Quarter of Section 29, known as Horse Shoe No. 1 and Horse Shoe No. 2. Tell us the size of that hole.

A. It had sloping ramps of 45 and 35 feet, with a 40-foot long center section, all of it about 12 feet wide and in the nature of six or seven feet at the deepest point and I calculated it at 150 cubic yards.

Q. Now, No. 8, which appears to be the Southeast Quarter and the Southwest Quarter of Section 29, known as Horse Shoe No. 3 and 4. Will you tell us the size of that hole?

A. That hole had ramps of 40 feet and 30 feet and a center portion of approximately 100 feet long. It was about three feet deep at the deepest point and I calculated the yardage about 150 cubic yards.

Mr. Wood: We offer this map as the defendants' next exhibit.

Mr. Painter: I object to the introduction of it on the [407] ground there has been no foundation laid and the data contained thereon is too remote.

The Court: Objection overruled.

The Clerk: Defendants' Exhibit MM in evidence.

(The document referred to was marked as Defendants' Exhibit MM, and was received in evidence.)

(Testimony of Joseph F. Golden)

Mr. Wood: At this time, if the court please, we offer the Defendants' Exhibit LL in evidence.

The Court: All right, it may be received.

(The document referred to was marked as Defendants' Exhibit LL, and was received in evidence.)

Mr. Wood: You may cross examine.

Cross-Examination

By Mr. Hedges:

Q. Mr. Golden, you were not here yesterday, were you? A. No, I was not.

Q. I show you Plaintiffs' Exhibit 1, a map similar to yours only on a little larger scale, and I call your attention to the fact that each of these red marks on the quarter sections have been identified as pits made by the plaintiff in this action, each one in each of the quarter sections, and in some there happens to be two, for example, in Temperate No. 3, there are two locations located in the same quarter section and the same is true in Tropical 1 and Temperate No. 4. I notice on your map that you only find one location. Did you see any other locations other than [408] the one you have indicated on your map on Temperate No. 4?

A. I believe there were some excavations that were made by Bratton & Sturgis right adjacent to some of these other holes in order to duplicate the hole at the approximate same site. I don't recall now whether I measured—

(Testimony of Joseph F. Golden)

Q. In fairness to you, you have one marked on the board here on our Temperate 4 location, and it is circled with a figure "17"? A. That is right.

Q. Which looks like it might be this one here?

A. That is correct.

Q. However, on Torrid 4 and Temperate 3—strike that. On Temperate 3 and Tropical 1 on Plaintiffs' Exhibit 1, there are two locations each, while you only show one on your map. Is that correct?

A. I only show one on my map.

Q. Did you notice any other pits similar in character to the ones you have identified at the two locations I have just indicated?

A. I can't remember exactly where they were. I recall that there were some excavations that were similar to the ones I was measuring at or near the ones that I measured. I believe that I was told that Mr. Bratton had excavated those, not on any station that I had set but adjacent to holes that were already excavated, that had been [409] dug by others and I didn't measure any that do not appear on my charts.

As I recall, I think that I was instructed not to.

Q. In other words, you didn't know who these various pits on the property belonged to? Someone informed you that some were the Lewis pits and some the Hammond pits and so forth, is that not a fact?

A. The only ones that I know of, of my own personal knowledge who excavated are the ones I indicate with

(Testimony of Joseph F. Golden)

the circle on that first map—the ones that were done by Bratton & Sturgis.

Q. And who requested you to make the two maps, Defendants' Exhibits LL and MM?

A. Mr. Lancaster.

Q. Mr. William Lancaster? A. That is correct.

Q. And is he the one that pointed out to you the various locations that are indicated on Plaintiffs' Exhibit 1, and told you whose locations those were?

A. That is correct.

Q. In other words, if he had not pointed out the one location each on Temperate 3 and Tropical 1 you would not have made a calculation of that hole?

Q. Well, I had a little—I had other knowledge, other information than that which I got from Lancaster as to [410] who had dug the holes and when.

Q. Well, let me put it this way. Mr. Lancaster told you there were 16 claims on those sections that were the claims of Mr. Lewis and the plaintiff in this action, is that correct? A. Substantially, yes.

Mr. Hedges: That is all.

The Court: Any questions?

Mr. Painter: May I have just a second, your Honor. No cross examination.

The Court: Any other testimony, Mr. Wood?

Mr. Wood: Yes, if your Honor please.

CHARLES H. BRATTON,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Charles H. Bratton.

Direct Examination

By Mr. Wood:

Q. Mr. Bratton, where do you reside?

A. El Centro, California.

Q. And what is your business or occupation?

A. I am a member of the firm of Bratton & Sturgis, whose business is land leveling and general farm work. [411]

Q. Are you familiar with the property that is in dispute here, described as Sections 20, 21, 28 and 29 in Township 14 South, Range 12 East? A. I am.

Q. Have you been on that property, Mr. Bratton?

A. I have.

Q. Were you on that property in 1946?

A. I was, yes.

Q. And what time in 1946 did you go on the property?

A. The first time I was on the property was on or about March 20th of 1946.

Mr. Hedges: Mr. Wood, would you have the witness explain what he is reading from? I assume they are his field notes. He appears to be testifying from some memorandum.

Mr. Wood: I am going to exhibit to you a copy of what he is using.

Q. By Mr. Wood: At whose request did you go on the land? A. Through Mr. Lancaster.

(Testimony of Charles H. Bratton)

Q. And did you do any work on this land?

A. I did.

Q. When did that work commence?

A. That work started March 23rd, 1946.

Q. Now, Mr. Golden on the witness stand has described on Defendants' Exhibit LL, 17 excavations commencing with, [412] over on the left-hand side, No. 1. Are you familiar with this map?

A. I have seen the map, yes.

Q. And do you know what those excavations are that are there? A. Yes.

Q. Now, did you do that work?

A. Yes, it was done with my equipment.

Q. And under your direction? A. Yes, sir.

Q. You were on the property from time to time supervising it? A. That is correct.

Q. Now, what was the reasonable value of the work done on excavation No. 1, which is the Southeast Quarter of Section 28?

Mr. Hedges: That is objected to. There is no proper foundation laid. This witness has not been qualified as I have heard yet, as to his knowledge of the cost of making excavations.

Mr. Wood: I will take it a little further along.

The Court: I assume he does, but I think he could be qualified a little more.

Q. By Mr. Wood: In your line of work, Mr. Bratton, have you done excavating work? [413]

A. Yes.

Q. Much of it? A. Considerable.

Q. And is that your general line, the moving and excavating of dirt? A. That is right.

(Testimony of Charles H. Bratton)

Q. And do you from time to time do that under contract?

A. Well, it isn't under contract. We do it either—I am assuming you want me to explain our type of work?

Q. That is right.

A. We move dirt in land leveling operations either by the yard or by the hour or by the job.

Q. Now, how long have you been engaged in that business? A. Since April 1st, 1943.

Q. And are you familiar with the cost of moving such dirt? A. Yes.

Q. Now, what was the reasonable value of the work done on location No. 1, the Northeast Quarter of Section 28?

Mr. Hedges: That is objected to as being incompetent, irrelevant and immaterial. I don't think that what the reasonable value was, your Honor, is material. If he wants to testify as to what the actual cost was of moving that on those locations I think that is material, but I don't think [414] the reasonable value has any bearing.

The Court: I think the statute says so many dollars to be spent on each 160 acres.

Mr. Wood: It says it must be dollars worth.

The Court: Well, a dollar's worth means a dollar's value.

Mr. Hedges: I believe his question was, "What was the reasonable value of the work?"

The Court: There are two ways of proving value.

Mr. Hedges: Well, I will withdraw the objection, your Honor. It is probably preliminary, anyway.

The Court: All right, go ahead.

(Testimony of Charles H. Bratton)

Q. By Mr. Wood: What was the reasonable value of doing the work on No. 1?

The Court: I will have to have the description of that.

Mr. Wood: That is the Northeast Quarter of Section 28.

The Court: Northeast?

Mr. Wood: Yes, Northeast Quarter of Section 28, known as Andrew No. 2.

The Witness: Do you want the yard value?

Q. By Mr. Wood: Dollars.

A. We did \$161.00 worth of work on that particular location.

Mr. Hedges: Is that the bill that you rendered? [415]

The Witness: Yes.

Q. By Mr. Wood: Now, on No. 2 or the Northwest Quarter of Section 28, known as Andrew No. 1?

A. On Andrew No. 1 we did \$161.00 worth of excavation.

Q. Now, on what is known as No. 3, or the Southeast Quarter of Section 21, Mack No. 1?

A. On Mack No. 1 we did \$160.00 worth of excavation.

Q. On the Northwest Quarter of Section 29, Jackman No. 1?

A. On Jackman No. 1 we did \$160.00 worth of excavation.

Q. The Southwest Quarter of Section 20, known as Buddy No. 3?

A. On Buddy No. 3 we did \$160.50 worth of excavation.

(Testimony of Charles H. Bratton)

Q. On the Southeast Quarter of Section 20, known as Buddy No. 4?

A. On Buddy No. 4 we did \$163.00 worth of excavation.

Q. The Northeast Quarter of Section 29, known as Jackman No. 2?

A. On Jackman No. 2 we did \$162.00 worth of excavation.

Q. On the Northeast Quarter of Section 20, known as Clay No. 3?

A. On Clay No. 3 we did \$163.00 worth of excavation.

Q. The Northwest Quarter of Section 20, known as [416] Clay No. 4?

A. Clay No. 4 we did \$162.50 worth of excavation.

Q. The Southwest Quarter of Section 29, known as Ben No. 1?

A. On Ben No. 3—

Q. I mean Ben No. 3.

A. On Ben No. 3 we did \$162.00 worth of excavation.

Q. The Southeast Quarter of Section 29, known as Ben No. 4?

A. What was the description?

Q. Ben No. 4.

A. The description?

Q. The Southeast Quarter of Section 29.

A. \$161.00 worth of excavation.

Q. On the Southeast Quarter of Section 28 known as Clay No. 2?

A. On Clay No. 2 we did \$162.50 worth of excavation.

Q. On the Southwest Quarter of Section 28, known as Clay No. 1?

A. On Clay No. 1 we did \$162.00 worth of excavation.

(Testimony of Charles H. Bratton)

Q. On the Northeast Quarter of Section 21, known as Carr No. 3?

A. Carr No. 3, the Northeast Quarter of Section 21?

Q. Yes.

A. That was \$162.00 worth of excavation. [417]

Q. The Northwest Quarter of Section 21, known as Carr No. 4?

A. \$162.00 worth of excavation.

Q. Now, a hole in the Southeast Quarter of Section 21, what was the labor cost on that hole?

A. Southeast Quarter of Section 21?

Q. Yes, I just want the labor cost.

A. The labor only in that hole was \$66.01.

Q. And that is the hole on the map here marked No. 17, is it not?

A. Yes, that was a test hole dug by hand.

Q. Now, the other holes that you dug down there, what kind of equipment did you use?

A. I used Caterpillar equipment equipped with a bulldozer and hydraulic scraper.

Q. How long did it take to do this work?

A. I was on the job there 15 working days.

Q. And approximately how many hours a day?

A. We averaged about 9 hours a day for each piece of equipment.

The Court: How many men on each piece of equipment?

The Witness: One man.

The Court: How many pieces of equipment did you use?

The Witness: I had a maximum of six units there.

The Court: All right. [418]

(Testimony of Charles H. Bratton)

Q. By Mr. Wood: Now, Mr. Bratton, in your business in the Imperial Valley do you employ what are commonly called laborers, pick and shovel men?

A. I don't commonly employ them, no, because my work doesn't involve that on the special jobs that we do.

Q. Now, on this job did you employ labor?

A. I did.

Q. And what was their rate of pay?

A. Their rate of pay was 75 cents per hour.

Q. Do you know what the prevailing rate of pay in the Imperial Valley for that type of labor has been for the last couple of years?

A. Last year at that time the prevailing wage for pick and shovel men, Mexican labor, was 75 cents per hour.

Q. Do you know what the prevailing rate was for Mexican labor in November and December of 1945?

A. I couldn't verify it. It would be approximately the same.

Q. Has there been any change to your knowledge in that in the last couple of years?

Mr. Painter: Object to that as already asked and answered. He said "approximately."

The Court: That calls for a conclusion. The objection is sustained.

Q. By Mr. Wood: In the doing of the work out there [419] on this property you used Mexican laborers with pick and shovels on some of these holes?

A. We did, yes.

Q. And can you tell us approximately or tell us how many, or approximately, how many cubic yards an hour was removed by the Mexicans in this work?

A. Well, it wouldn't—do you want the individual amount per man or by the group?

(Testimony of Charles H. Bratton)

Q. Well, for instance, if you can answer it by the man I would like to have it that way.

A. Well, in that type of soil it varied out there, but in the hardest clay in which we were digging I would say that a man would average in a day's work, he might dig out two or two and a half yards of that clay per man.

Q. And in the stuff that was not so hard would he increase his production? A. Yes, he would.

Q. Do you know approximately how much cubic yardage—how much a cubic yard it cost you to remove the clay out there by hand?

A. By hand the nearest we could calculate the yardage at would be about a dollar a yard.

Mr. Wood: You may examine.

Mr. Hedges: No cross examination.

The Court: Any questions, Mr. Painter? [420]

Mr. Painter: No cross examination.

The Court: Any further testimony, Mr. Wood?

Mr. Wood: Yes, I want to recall Mr. Lancaster for a few questions. Just a minute, I overlooked one thing with this witness.

The Court: Very well.

Q. By Mr. Wood: Mr. Bratton, are you familiar with the moving of dirt with a bulldozer and carry-all in the Imperial Valley? A. I am.

Q. And do you do that type of work?

A. Yes, we do.

Q. Can you tell the court what it would cost in your opinion, to move the dirt per yard of the type that was found on these premises?

A. In averaging our costs on the yardage basis out there it would average about 30 cents a cubic yard.

(Testimony of Charles H. Bratton)

Q. And you moved the dirt in substantially the same manner?

A. We moved the dirt in the same manner with the equipment, yes.

Mr. Wood: That is all.

Mr. Hedges: No cross examination.

The Court: I have nothing.

Mr. Wood: Mr. Lancaster, will you take the stand? [421]

WILLIAM F. LANCASTER,

called as a witness by and on behalf of the defendants, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Lancaster, after Mr. Jose finished his work down there did you examine that work? A. I did.

Q. On each of the 16 sections?

A. That is right.

Q. And were you able to determine approximately how much of a cut he had made on those sections?

Mr. Hedges: Just a moment. By that what do you mean, counsel? The area or yardage?

Mr. Wood: I am asking for area first and then yardage.

A. Well, the open cuts I would say there was approximately, between 60 and 70 yards of dirt was moved on the average on all the 16 sections. Some of those near the road were more than that, about 400 cubic yards.

(Testimony of William F. Lancaster)

Q. On each section approximately how much cubic yardage of dirt did he remove from the cut in each quarter section? A. Approximately 60 to 70 yards.

Q. Do you have a picture of that section you were [422] exhibiting to me this morning?

A. Yes, I think I have.

Q. Now, this represents what hole, Mr. Lancaster?

A. That represents Mr. Lewis' hole.

Q. Do you recall what section it is on?

A. Yes; it is on the Southeast of Section 28.

Q. Southeast Quarter of Section 28?

A. That is right.

Q. Who took that picture? A. I did.

Q. And when did you take that picture?

A. I believe—

Q. It is not marked.

A. I took that picture in April 1946.

Q. By Mr. Wood: And—

Mr. Wood: We offer this as Defendants' next exhibit, your Honor.

The Court: It may be received.

(The document referred to was marked as Defendants' Exhibit NN, and was received in evidence.)

Mr. Wood: That is all.

The Court: Any questions?

Mr. Hedges: Just one or two. [423]

(Testimony of William F. Lancaster)

Cross-Examination

By Mr. Hedges:

Q. How many yards did you estimate, Mr. Lancaster, had been removed from the location which you described to be the Southeast Quarter of Section 29 as "Mr. Lewis' hole"?

A. When I examined it it didn't look like very much to me, about ten yards at the most.

Q. Your business is—you are an auditor, are you not? You are not an engineer? A. That is right.

Q. Were you here when Mr. Imler, the registered engineer, testified that he calculated it at 50.2 cubic yards?

A. That is right.

Mr. Hedges: That is all.

Mr. Painter: No questions.

Mr. Wood: That is all.

The Court: Any further testimony by anybody?

Mr. Hedges: That is all.

Mr. Painter: That is all.

The Court: Do all parties rest?

Mr. Wood: May the record show, if your Honor please, a request was made on us yesterday to produce the receipts and checks of Mr. Lancaster. I have exhibited them to counsel. [424]

Mr. Hedges: I have seen them and I am satisfied.

Mr. Wood: We are perfectly willing to have them satisfied.

Mr. Painter: Are you through, Mr. Wood? Could we have two or three minutes?

The Court: I was going to declare a short recess and then after that I will hear any argument you desire to present. If you have additional testimony I will hear that.

(Short recess.)

The Court: All right, gentlemen.

Mr. Painter, have you decided about rebuttal testimony that you may have?

Mr. Painter: No, we are resting.

The Court: All right, I will hear any argument.

Mr. Hedges: Mr. Shirley is going to make the opening argument, your Honor.

The Court: All right.

Mr. Shirley: Upon the theory, your Honor, that perhaps I should earn my part of the fee in this matter I have been delegated the task of presenting the opening argument.

The locations that were made in this matter reminds one of people trying to catch a train. Everyone rushing madly to get their notices down—even running, it has been testified to here, and getting the stakes in the ground as quickly as possible, and, I think, without too [425] much regard to the question of their security in some instances, but considering mostly the question of speed.

Section 2303 of the Public Resources Code of the State of California, says:

“The location of a placer claim shall be made in the following manner:

“(a) By posting thereon, upon a tree, rock in place, stone, post or monument a notice of location, containing the name of the claim, the name of the locator or locaters; date of location, number of feet

or acreage claimed and such a description of the claim by reference to some natural object or permanent monument as will identify the claim located."

Now, there is a P.S. on this statute that says that if they are surveyed lands that a description, a reference to the legal description thereof will satisfy the requirements of the Code that the property be designated by reference to natural or permanent monuments.

The Court: Also there shall be a marking.

Mr. Shirley: Marking, yes.

Now, the following section, Section 2304, Subdivision "B" provides what shall be done with reference to discovery work.

Section 2305 provides what additional work shall [426] be done if there is more than 20 acres involved. As there was in this case, there must be an expenditure of a dollar an acre at least, and in addition to a seven-foot cut on the claim—seven cubic yards—that is, a removal of seven cubic yards upon the claim.

I would like to say that it is my understanding of the law that in order for a person to locate a piece of property where there is likely to be conflicting claims, it is incumbent upon him to proceed with the greatest of precaution to see that his claim will be marked and delineated in a safe and as permanent a matter as possible for the purpose of giving notice to all subsequent locations.

That is what the plaintiffs in this case did. In the first place, your Honor, they drove a stake into the ground upon which was printed in black paint, the legal description of the property and the name of the claim.

That alone should be sufficient and is legally sufficient to mark the claims, but in addition to that the plaintiffs in

this case acquired Mason jars and they buried these Mason jars at the foot of these posts, with the sealed top plainly visible, and inside of this Mason jar they inserted a duplicate copy of the claim which is in evidence here. In other words, in each instance, so far as the plaintiffs are concerned, it is my opinion from a review of the evidence in this case, that the conclusion is impelling that they complied with this requirement of the law in every [427] respect; that there is no one who could subsequently come upon this land and view the markings and the postings without knowing that there had been someone there. And I will submit to your Honor that you may go to the property now and with reasonable certainty you may expect to find upon that property evidence of the markings of the plaintiffs in this case.

The point I am making is they did not, your Honor, in their haste, and of course everyone in this case was a little bit in haste, but they did not overlook that one requirement of the law that they exercise a reasonable amount of safety and precaution in the marking of these properties.

Now, after they had marked and properly filed upon these properties by marking them properly as I suggested, they then proceeded to do the discovery work.

Now, how was this discovery work done? Your Honor, it was done in the manner that is customary in mining. It was done by hand labor. They brought in picks and shovels. They dug from this property sufficient of the overlay of dirt to reach the clay which is the valuable thing about which these people are concerned.

They removed a sufficient quantity of the dirt in every instance—they removed more than 7 cubic yards and in many of them 32 cubic yards even in the hardest of clay,

and in every instance they have removed more than [428] sufficient and in every instance they spent more than \$160.00 per claim, each claim constituting 160 acres.

In short, the uncontroverted testimony before this court now, notwithstanding the attempts of anyone to discredit any testimony given by the bankers that were produced here.

They had received this cashier's check. In one instance it was for \$2,500.00. The testimony was that these men were paid in the bank and that the money was put in envelopes and paid. Even the time book was before the court. All the evidence in this case is very impelling, it seems to me, that the plaintiff has in the best of good faith and very properly complied in all respects with the requirements in the law as far as their filings are concerned.

Now, after that was done in accordance with Section 2313 of the Public Resources Code, the plaintiff in this case filed, or recorded with the County Recorder of Imperial County a copy of the notice of location. Upon the back of each notice of location that was recorded there was contained all of the information that Section 2313 sets forth must be recorded. In other words, simultaneously with the filing of these notices there accompanied the notice a statement of the amount of discovery work that had been done and these were recorded in Imperial County within [429] the period prescribed by that section.

In other words, I am not going into great length about the plaintiffs' case because I think the evidence is very impelling before the court that they have complied in all respects with the requirements of the Federal and State statutes with reference to filings upon these claims.

Now, with reference to the claim by Mr. Jose and others, the first thing, of course, that I would like to say and dispose of quickly, is that under this Act of October 19, 1920, anything that was done prior to the 7th day of September, 1945 is, in our opinion, an absolute nullity; that it gave him no rights; that it vested him with nothing and that if he was ever in possession prior to that time it was illegal and that he has no rights and had no rights at any time in this action as far as the evidence is concerned prior to January of 1946, if he has any at all.

Even if there were defective notices filed on this property in January of 1946 Mr. Jose was in no position to come upon this property, knowing as he was bound to know at that time, that there were others in the possession of that property under a legal entry. He knew by that time that this land had been re-opened for entry. He could look at the property and physically see that people had been working the property. It was evident to the naked eye. There were mounds. There were holes dug. There had been [430] large amounts of clay removed. He could see with the naked eye even if there had not been a posting on the property. He could see that they were in the possession of someone else.

Therefore, in January of 1946, when he came in and attempts to make a location upon this property he violated the statute and he was a trespasser and he knew that someone else was in possession. Possession itself is notice and is sufficient to exclude the rights of anyone else coming in and making an attempted location.

With that I am going to dispose of the Jose claims because I think they are absolutely void and subservient to the rights of the plaintiffs in this case and for that matter, the other defendants.

As to the defendants Hammond, et al., there are three things that I think put the plaintiffs in this case in the position of the owners and holders of the greatest equities and the greatest rights.

The first thing is this. I think it would be superfluous for me to say that quite obviously the parties concerned knew that there were going to be conflicting claims. I think that is quite obvious. They ran when they filed their claims. They had stakes that they drove into the ground which they said they drove in in some instances six inches and in some instances ten inches up to twelve, [431] and then they ran right quickly and took a picture. It would amaze anyone who had been on the property, and I have, to visualize on a hot summer day anyone performing those acts in the rapid sequence and fashion which they have indicated. Even assuming the entire veracity of their claim, they made no notation on their claims as to time. I think that is significant because in every instance where a claim was filed on both the 6th and 7th of September by the plaintiffs in this case, they in the best of good faith and open and above board placed upon those notices the time of day that they posted that claim.

While I am mentioning the 6th of September I might say to your Honor that the position we take with reference to our filings on the 6th is this: We filed on the 6th of September out of an abundance of precaution because we were not certain whether the day was going to be—the date was going to be—whether the 6th day of July was going to be counted or not and, therefore, out of an abundance of precaution, as I said, we filed on the 6th of September and then were there again, of course, to file on the 7th.

We felt, too, that the 7th was the proper date for the filing. But on the 7th of September when the defendants Hammond, et al. filed their claims, they placed them upon a board and they nailed them by a tack or something to these boards in a precarious fashion and on the open desert [432] where the winds blow and there was testimony before your Honor the wind does blow out there. He said there was a nice breeze. In other words, they were placed upon a stake, nailed to a board subject to the elements and subject to being blown away by the wind.

I would not question that, your Honor, if it were not for the fact that the parties knew that there were to be conflicting claims; that they must have known that the question of whether or not that was a property filing was going to be questioned. They must have known that it would be—that if they were trying to give notice to locaters the very purpose of the statute would not be served by this type of filing and they made no attempt at all of any kind to bury any of these claims—any of these filings in tin cans or otherwise. They made no attempt at any time to establish monuments, to bury these things in monuments as is held in so many instances as a requirement, and at the very same time that they were recording—that they were filing their notices on this land there was a man in the Recorder's office in Imperial County standing there with the originals of these claims and he threw them into the filing window at exactly ten o'clock and they were then recorded.

Now, there is some law to the effect—excuse me, I don't want to leave my first point. My first point is that they were obligated to exercise an amount of caution in [433] the filing of those claims because they were charged with knowledge of the fact that there would be conflicting

claims. And I want to call your Honor's attention to a volume of Lindsay on Mines, Volume 2, and particularly referring to Section 365, and in the middle of page 821, reading a paragraph from this book, which says:

"It is manifest that some precaution should be taken to protect the notice from destruction by exposure to wind and weather. While the law does *does* not require specifically the locator of a claim to keep his notice up permanently, perpetually, that is, yet ordinary prudence suggests it should be maintained and properly protected."

I observe that one of these has been brought into court here and is now among the records.

There is no testimony as to how it became detached from the location and I am not sure that the mere bringing it in here is not of itself an abandonment of the claim because it is no longer on the property and I think it is an abandonment of the claim.

Further reading from Lindsay on Mines, and it has always been my understanding from that Lindsay is the miners' Bible—Section 371 of that same volume at page 872, Mr. Lindsay says:

"The object of the law in requiring the location [434] to be marked on the ground is to fix the claim to prevent floating or swinging so that those who, in good faith, are looking for unoccupied ground in the vicinity of previous locations, may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue. It also operates to determine the right of the claimant as between himself and the general Government."

On that same point, further reading from Lindsay on Mines, Section 375, page 829, Mr. Lindsay says:

“Ordinary prudence will suggest to the locator the advisability of preserving his marks. A failure to so preserve them exposes the owners to hazard occurred by the death of locaters and witnesses and other circumstances which might prevent the fact of marking from being established. Owners, therefore, should use reasonable diligence in restoring and identifying boundary monuments.”

I think in their anxiety to beat everyone else in point of time, that they overlooked and neglected another very substantial requirement of the law and that is not only that they be first in point of time, your Honor, when it is only a matter of minutes, but that they also use the necessary precaution so that when they are marked that any subsequent [435] locator may know the marking.

In their further anxiety to beat everyone else they, as pointed out a moment ago, recorded these claims before they were ever filed.

We objected to the introduction of those claims upon the ground that they had been recorded before they had been filed and they were offered in evidence for the sole purpose of proving that a duplicate of those instruments had been filed on the ground, as I understood it, and for no other purpose.

The filings that were made on that day and that were recorded on that day are void for the reason that, in the first place, they give no notice to anyone because a notice of location is not required to be filed until there is filed simultaneously therewith or accompanying it, a statement of the discovery work that has been done. That was not

attached to this claim. It was not filed in accordance with Section 2313 of the Public Resources Code and it is void.

But even assuming that it is not void—well, first of all, I would like to substantiate that statement by a reference to American Mining Law by A. H. Ricketts, Section 698. He says:

“In the absence of any intervening right the recording of a notice of location before it is posted upon the ground will not vitiate the location.” [436]

Now, it says:

“In the absence of intervening rights,”

and I submit that in this case there were intervening rights because they recorded these before they filed in every instance except possibly one, and that is the first recording and that was recorded at ten o'clock. Every other one was recorded subsequent to that in point of time and they are void so far as the plaintiffs in this case are concerned because of their failure to comply with 2313 of the Public Resources Code.

Now, there is a third point that I wish to make with reference to the Hammond claims and then I am going to finish my argument.

There has been introduced in this case what is called an amended claim by Hammond. An amended claim can relate back and amend only a valid claim. An amended claim cannot revert back and cure defects in a void claim.

The amended claim was recorded for the very simple reason that the first location did not at any time contain the information that is required by Section 2313 of the Public Resources Code.

When they recorded the amended claims they did put in a reference to the boundary marks which, incidentally,

was also not included in the first claim, and a statement of the work that had been done.

That amended location was never posted upon the [437] ground or filed upon the property. It does not contain the same information that was upon the original notices that were posted in the ground because the original notices did not contain a statement, a reference to the natural monuments and so forth which were contained on back of all the plaintiffs' claims and are legally required to be filed; and they were never at any time re-located.

Besides all that, your Honor, even if there were no reason for holding that they are void or that they cannot relate back to the original filing, the fact of the matter yet remains that intervening rights had come in between the time of the filing of the original notice of location and the filing of this amended location.

That is important for this reason. There has never at any time been recorded in the County Recorder's office of Imperial County these locations which were originally filed on the 7th day of September, 1945. The only recording that was done in accordance with Section 2313 of the Code is the recording of that amended notice of location.

Now, between the time that this notice was filed, the original notice was filed and the amended notice was filed, certainly intervening rights came in and those rights are the rights of the plaintiff.

I wish again to refer to my friend Lindsay on Mines, Section 398 at page 929, in which this is said: [438]

"A distinction is drawn between cases where the original certificate is absolutely void or where the amended certificate seeks to appropriate new and additional ground and one where the original is simply

defective. If in making the amended location it included land not in the original location and interfered with existing rights as to such land the amended location would not relate back to the date of the original location so far as the recently included land is concerned."

The Supreme Court of Arizona expresses the opinion that the word "void" used in the statute should be construed to mean "voidable." In other words, a notice failing to conform to the statute and thus declared by law to be void may, in the absence of intervening rights, be made valid by an amended claim.

The same statement in effect, will be found, your Honor, in Ricketts American Mining Law, Section 711:

"Where a record is found to be defective or erroneous it may be amended when not detrimental to an intervening locator. The amended record takes effect by relation back to the date of the original location and is admissible in evidence in connection with the original defective record." [439]

Now, I submit, your Honor, that the plaintiff in this case has established the filing of valid locations, the performance of the necessary discovery work, the recording in the County Recorder's office of the information required by Section 2313 of the Public Resources Code. Everything in connection with the plaintiffs' claims is regular and proper. Everything that was done was done with the necessary precaution and in a good and proper manner and in the manner that the law required, and we submit in determining the matter here the plaintiffs' claims should be held valid in all respects.

The Court: Mr. Painter.

Mr. Painter: I assume, having been the second in the presentation of our case, I should proceed.

The Court: All right.

Mr. Painter: If your Honor please, I am going to take a slightly different position here than the plaintiffs did in connection with this matter. I am going to submit to the court that I think it is apparent from the evidence that has been introduced, that we were not fortunate enough to have run fast enough on that morning to have covered the whole territory.

I can't see that any penalty should be attached to anyone for hurrying about in the middle of a desert on a warm day. There wasn't any question but what the two groups [440] knew that each one was trying to outdo the other in speed in reaching these various claims.

I admit that our men worked diligently to post the properties as rapidly as they could. I submit that an examination of the time of the filing of Plaintiffs' claims will indicate that they did some very fast walking, if not running, themselves, to have covered the territory that they wanted. So, so far as that part of it is concerned, if your Honor please, I don't think it has any bearing on the case whatsoever.

So far as the permanency of the postings is concerned, I don't think there is anything that counsel has read to us that has in the slightest degree discredited the manner in which the claims of the defendants and cross complainants, Hammond, et al., were posted.

In fact. I think that the proof of the pudding, if your Honor please, is the fact that in November of 1945, when Mr. Wilson visited the property, each one of those notices was still in place, posted as they were placed there on the property.

So far as having conformed to the statute, that is to let the world know that the Hammond group are claiming those parcels of property as a mining claim.

I think that the method adopted by the Hammond group was much more fair than that adopted by the plaintiff. [441]

And bear in mind now that I am not criticizing the manner in which the plaintiff posted their notices. I think they went around and did it as best as they could to conform to what in their opinion was the law.

However, bear in mind the manner in which these notices were posted. They were posted in pint jars or were placed in pint jars in a shallow hole that was dug on the property.

Now, I submit to your Honor that within 24 hours, with normal conditions on the desert and with this brisk wind blowing, there was a very strong possibility that each and every one of those jars would be covered by the shifting sands.

Now, there is nothing left then but a post on which has been placed some figures; and those are very small posts, as they testified.

Now, if there is going to be any criticism here of the manner of posting let us compare the two methods and find out which one really gave notice to the world. I think it can be answered in this way, if your Honor please. Here were notices that were posted on that property that two months later stood there in place and were still telling the world that the Hammond group was claiming those claims as mining claims.

They were posted on boards that stood out so that [442] you could see them. They are there on the desert and I think there cannot be any question but that the statute was complied with in that respect. So, I don't

think as between the plaintiff and defendant Hammond that there should be any criticism as to the manner in which the postings were made.

Read the statute and you can see there are several methods provided and the elements unquestionably would attack each one of those notices posted under any one of those procedures and there isn't any provision in there that they be placed in a jar and buried in the sand or placed in a can and buried in the sand.

The fact of the matter is if we want to get technical about it, that is the least fair of all methods and gives the least notice to the world.

Now, I am going to take a different position than they have in connection with the filings on these properties.

I think as between the plaintiffs and the Hammonds that the evidence shows that they are ahead of us on certain claims because they have and did file their notices of location on those claims before we did. The record so shows. The record is clear in that respect.

Their criticism as to the time element involved, if I recall the testimony correctly, was that Mr. Hedges asked Mr. Norris when he was on the stand, if he had kept any record of the minutes involved and the time involved and he [443] was handed by Mr. Norris a sheet of paper on which he kept notes while that was being done on the property. We have never heard a bit of criticism from Mr. Hedges about the contents of that instrument and it was being used by Mr. Norris on the stand.

I think that he responded to a question by Mr. Hedges that those were memos that he made at that time and that place which were placed on the other exhibit which he had, and which he had in his hand, and is here for identification. So, there can be no question as far as

these claims are concerned, with the possible exception of four claims in the most southerly portion of the property, the exact hour and minute at which those claims were posted—were properly posted and properly before the court.

Those four locations are Frigid No. 3, Frigid No. 4, Tropical No. 3 and Tropical No. 4, where Mr. Thompson stated that he left the automobile at about 11:35 and went down to Silver Heels No. 3 and drove his post in the ground there, built some stones up around it and went over to Silver Heels No. 4 and did the same thing. And then he went back to the automobile and back to Horse Shoe No. 3 and he did the same thing on Silver Heels Nos. 3 and 4, and then over to Horse Shoe No. 4 and did the same thing there.

Now, on those four claims he estimated the time. There isn't any question about it, however, from the time [444] element involved, in going from point "D" down to Silver Heels, to Section 28, which is this section in here, and back over across to the machine again, and back to the other plot.

I don't think by an analysis of that that one would say the time element is very far off.

There is a very interesting thing, however. It will be observed that, taking the plaintiffs' testimony as to the time when they posted, and those postings were all done by this young chap Hodgson—I am not disputing his word that the time testified to by him was the actual time that they posted on those four parcels down there. And in my opinion if the court holds that by posting ahead one minute creates an interest there—

The Court: Providing your notice was not defective. If your notice was defective your recording was also defective.

The fact of the matter is, your amended recording was not a true copy because it had matters which were not in the original. Therefore, if your original notice did not comply with the law—

Mr. Painter: That is not correct, your Honor. The notices which are marked as Defendants' Exhibit KK are exact duplicates of the notices which were posted on the property. The only thing that is added thereto is that statement which is required by the statute, to-wit: The [445] statement of the discovery work performed, and if your Honor will examine that group of exhibits, No. KK, and compare them with the group A to P, you will find they are exact duplicates of A to P which were identified and were introduced only for the purpose of having before the court the exact copy of the instrument which was posted.

Now, you remember we established the making of the 16 cardboards and then the comparison of those cardboard cards with Exhibits A to P. Then we introduced Exhibits A to P simply for the purpose of establishing what was the content of each one of the notices which was posted.

The notices which were recorded on the 24th day of November were the ones which complied with the statute. Those contained—

The Court: But it was more than 30 days.

Mr. Painter: It is a 90-day period, your Honor. We have a 90-day period within which to record an instrument and correct copy of the posted notice.

Mr. Hedges: 90 days is correct, your Honor.

The Court: This evidently has been changed. Mine reads 30 days.

Mr. Painter: In other words, the situation is simply this, your Honor. The statute requires us within the 90-

day period to record an instrument and correct copy of the notice which was posted, and containing certain information. [446] By comparing Exhibits A to P and KK you will find that as far as the statutory requirements are concerned they contain everything that is required by the statute. And in addition to that contain—that is everything that was required by the statute to be contained in the posted notice, the one that was posted on the property. In addition to that there is added to the claim the statement of the work done, which is required by the statute; that the recording on November 24th was within the 90-day period.

Now, as far as the—in view of the argument which has ensued here, I think we have covered all of the points involved in regard to the recordation unless your Honor has further matters in mind that you wish me to cover.

We have established here the fact that we posted within the 90-day period—we recorded the notices of location. I don't think there is anything in the statute nor is there anything in the case law that holds that a recording on September 7th vitiates the posting. I don't know of any case that so holds.

Now, the notice which was posted on the 24th of November, after the work was completed, is the notice which your Honor must look to to see whether we complied with the statute. If it contains the things required by the statute, which I am quite sure your Honor will find after reading the statute it does, then we have complied with the provisions [447] of the Resources Code in the notices of posting and recording of our notices within the time required by the law. As to the discovery work, I don't think there could be any question about it. The purpose for which it was done was obvious. Our intention was to find what the law requires us to find

and that is whether there was something of value on that property which could be the subject of a mineral claim. The fact that we found it is the evidence of Mr. Wilson. On every claim, if your Honor will recall, they went down to, most of them, to the point where the clay became so hard that they couldn't even break it loose with the tractors on the bulldozer. They got as much out as they could with the carry-all and then they proceeded to try to break it down further with the tracks of the bulldozer. So, so far as that is concerned the work was completed pursuant to the statute.

The Court: All right, Mr. Wood.

Mr. Wood: If the court please, inasmuch as I didn't participate in the race I will eliminate from my argument anything with respect to the filings. Whether they are good, bad, or otherwise we are not interested in the filings that were made by my clients prior to September of 1945.

I did not offer any evidence on that because I believe the court would hold, and properly so, that the land having been withdrawn under the first provision of the [448] Irrigation Act, that nobody could file a mining claim on it.

We are relying, as the court knows from the evidence that has gone on, upon the inadequacy of the work that was done by both of these claimants.

The plaintiffs have offered in evidence the number of cubic yards that they moved from each one of the holes on the various quarter sections. And the difference in the yardage moved isn't sufficiently adequate to argue about if our understanding of the law is correct.

With respect to the Hammond defendants, there is a large discrepancy. Their witnesses claim that they removed approximately 400 cubic yards off of each claim.

Now, how much they paid for that work, of course, we don't know. They offered no evidence. They offered the evidence of Mr. Wilson that five days of work with a tractor and carry-all and two men moving the ground was of a value which had to be a minimum of \$2,560.00.

I am not going to argue that to the court. Our position is that they had to do the work as required by Section 2304 and by Section 2305 of the Public Resources Code.

Now, Section 2304 is not quite as clear as it might be. Subdivision (A) of that section provides that within 90 days after the date of location of any lode, mining or placer claim hereafter located, the locator or locaters [449] thereof shall sink a discovery shaft upon the claim to a depth of at least 10 feet from the lowest part of the rim of the shaft at the surface, or shall drive a tunnel or an open cut to at least ten feet below the surface.

Then Subdivision (b) is an exception with reference to a placer claim and it provides that in lieu of the discovery work required by paragraph (a) of the section, the locator—I call your Honor's attention to the fact that that is in the singular, the locator of a placer mining claim may, within 90 days, and so forth, remove from the cut not less than seven cubic yards of material.

And in that connection I want to call to your Honor's attention paragraph 35 of Title 30 of the United States Code.

Down in the middle of that section it provides, in dealing with placer claims, this language:

“And no such location shall—”

reading each individual claim and then section 36:

“provided no claim shall exceed 160 acres for any person or association.”

Now, with respect to that language of one person or association, that has been held to mean that the word "person"—in other words, it provides there must be, in order to take up 160 acres, there had to be eight claimants. In other words, there had to be eight locaters and as a [450] result we find ourselves in this position. If Subdivision (b) of Paragraph 2304 is applicable rather than Subdivision (a) of Paragraph 2304 of the Public Resources Code of the State of California, these people were required, by Section 2305, to do not only a dollar's worth of work for each acre they took up, but in addition to that they were required to perform seven cubic yards of work for each 20 acres.

Now, Section 2305 of the Public Resources Code provides additional work on certain placer claims. And it provides for the recording of the claims within 90 days. It also provides that the locater shall perform at least one dollar's worth of work for each acre included in the claim. The work may all be done at one place on the claim if so desired and shall be actual mining development work exclusive of cabins and so forth.

It provides that nothing in the section shall be construed as a modification of the requirements of Section 2304.

Now, there is no evidence in this record that the plaintiffs in this action have on any single claim met the requirements of Section 2304. Their evidence is confined entirely to that required to be done by Section 2305. The same likewise applies to the Hammond defendants.

That is all we have to say.

Mr. Shirley: I would like to dispose of the last [451] argument that has been made. First, I would like to call your Honor's attention to the case of Consolidated Mutual Oil Company versus the United States. I have your Honor's volume here before me which, at page 251 in Federal (2d), reading from page 522:

"A location made by an association of persons, as said by Mr. Justice Henshaw, speaking for the Supreme Court of California in the case of Miller vs. Chrisman, 140 Calif. 440:

"'by the very terms of the law, is one location covering 160 acres and not eight locations each covering 20 acres. The boundaries required to be marked are the boundaries of the 160 acres, and not the boundaries of each separate 20 acres. The expenditure of \$500.00 before patent issues is an expenditure required upon the whole land, and not an expenditure upon the 20-acre subdivisions thereof, and the only assessment work required is labor to the value of \$100.00 upon the single location, and not upon any 20-acre subdivision thereof. Logically, therefore, since in marking boundaries, doing assessment work, and expenditure for patent the 160 acres are treated as an entirety under one location, for the purpose of discovery it should be treated in the same manner; and this [452] is the ruling, with some conflict in its earlier decisions, which the Land Office of the United States has finally returned to and settled upon. In the case of Union Oil Company, 25 Law Division, 351, it is explicitly declared: "A placer location, if made by an association of persons, may include as much as 160 acres. It is nevertheless a single location, and as such only a single

discovery is by the statute required to support it.”
With this declaration we are in full accord.’ ”

Now, the next paragraph:

“Nor has Congress so far fixed any limit to the number of locations that may be made by the same person or persons—its policy having always been to encourage the exploration of the public lands and the discovery and development of such minerals as may be found in them. And it has long been the established law respecting such claims that, where two or more contiguous ones are held by the same person or persons, work done in good faith upon any one of them, or outside of the boundaries of either of them, which directly tends to the development or benefit of all of the claims for mining purposes, should be held applicable to each and all of such claims.” [453]

Now, I would like to say a few words further about the Hammond claims. In the first place, I called your Honor’s attention—

The Court: They refer to the Chrisman?

Mr. Shirley: Yes, 140 Cal.

The Court: But that was repudiated by Judge Stephens, Judge Harold M. Stephens, and also by Justice Miller. That is found in 97 Fed. (2d) 271. They repudiate the doctrine in the Chrisman case. That was decided in 1938.

Mr. Shirley: The point that your Honor has made I haven’t any law upon so I will have to come back to it at a subsequent time.

I neglected in my opening argument to say I have a Federal case holding that the word “post” which is used to describe the manner in which you may put something on the land to file on it, does not mean a stake. It

means something of a permanent nature and I would like to cite that to your Honor as an interpretation of the word "post." I would further like to call your Honor's attention to the fact that Section 2304 of the Public Resources Code does not use the word "stake" at all. It uses the word "post." And this case of *United States vs. Sherman* in 288 Federal at page 497, holds that the word "post" is not the same as a stake.

I think it is somewhat ridiculous to say that the filing of a claim on a stake in the ground, driven a few [454] inches into the ground on the open desert, subject to the elements to such extent that even the one they bring into the courtroom today is so faded they cannot even tell that it has ever been signed, if it ever was in fact. The physical appearance of it is that it never was and yet they try to prove by their witnesses that it is. I think it is ridiculous to say that the precaution which we took in this matter is not in accordance with the law and the thing that they did is in accordance with the law.

Ricketts on American Mining Law says:

"It is manifest that some precaution must be taken by a locator to protect his posted notice of location from destruction by the elements. This some locaters seek to do by covering such notice with glass or folding it in a box and placing the box in a conspicuous place or putting the notice in a mound of rocks or putting the notice within a tin can."

And the cases are legion to the effect that where a post is driven into the ground with the designation plainly marked upon it, printed upon it, and the glass buried beside it is a good location of property. We can submit cases to the court on that point. I don't have them here at my fingertips, but there are many cases to that

effect. I was in the library today at noon and in the Federal Digest there [455] are a number of cases where that is so held. I submit that counsel cannot produce any cases where there is a contest between the respective claims or claimants, where the posting of a notice in that fashion could be held to be good as against the posting in the fashion done by the plaintiffs in this case.

The Court: All right, gentlemen. Is there anything further you want to add?

What is the title of the case on the question of posting?

Mr. Shirley: It is United States versus Sherman, 288 Federal, 497.

The Court: What circuit?

Mr. Shirley: I don't have that, your Honor.

Mr. Painter: Would your Honor care for me to submit any memorandum on that?

The Court: No, I think this question will turn more on a question of fact than a question of law and it is for the court to determine in the light of the conflicting evidence which of the locaters has made compliance with the statute, both in the manner of posting and the matter of later on performing the assessment work. It is a matter of evaluating the testimony in the light of the testimony given by the persons who performed it and the credence to be given to them. [456]

I want to thank you for the promptness and for the celerity with which you gentlemen have presented your case. You will hear from me in a few days. If there is nothing more the court will be in recess.

(Whereupon, at 4:30 o'clock p.m., the above entitled matter was concluded.)

[Endorsed]: Filed Oct. 2, 1947. Edmund L. Smith, Clerk. [457]

[Endorsed]: No. 11749. United States Circuit Court of Appeals for the Ninth Circuit. J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker, John S. Patten, Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary C. Delaney and Irvin S. Barthel, Appellants, vs. Hattie M. Houck, as Administrator of the Estate of Stanley B. Houck, Deceased, Ruby E. Edling, Wilna M. Shepard, Hattie M. Houck, Ruth M. Heberd, Minnie N. McKenzie, Howard H. McKenzie, Veronica K. Ghostley and H. W. Lewis, Appellees. Transcript of Record. Upon Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed October 3, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11749

STANLEY B. HOUCK, RUBY E. EDLING, WILMA
M. SHEPARD, HATTIE M. HOUCK, RUTH M.
HEBBARD, MINNIE N. McKENZIE, HOW-
ARD H. McKENZIE, and VERONICA K.
GHOSTLEY,

Plaintiffs (Appellees),

vs.

J. A. JOSE, OLGA JOSE, CORDA LANCASTER,
WILLIAM LANCASTER, ELLA JACKMAN,
JOHN I. JACKMAN, GEORGE H. HAMMOND,
A. L. BERGERE, J. C. BERGERE, WILLARD
WALLACE, EDNA M. WALLACE, JAMES P.
DELANEY, MARY J. DELANEY, IRVIN S.
BARTHEL, R. UTTER, et al.,

Defendants (Appellants).

HARRIS H. HAMMOND, A. L. BERGERE, J. C.
BERGERE, WILLARD WALLACE, EDNA M.
WALLACE, JAMES P. DELANEY, MARY J.
DELANEY and IRVIN S. BARTHEL,

Cross-Claimants,

vs.

J. A. JOSE, OLGA JOSE, CORDA LANCASTER,
WILLIAM LANCASTER, ELLA JACKMAN,
JOHN I. JACKMAN, GEORGE T. RENAKER
and JOHN S. PATTEN,

Cross-Defendants.

STATEMENT OF POINTS RELIED ON BY
APPELLANTS ON APPEAL

Come now the Defendants and Cross-Claimants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna W. Wallace, James P. Delaney, Mary J. Delaney, and Irvin S. Barthel, through their attorneys, Reynolds & Painter and William W. Kaye, and the Defendants and Cross-Defendants J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker and John S. Patten, through their attorneys, Michael F. Shannon and Thomas A. Wood, and submit the following Points on which they intend to rely on Appeal:

I.

The evidence is insufficient to support the Findings of Fact, Conclusions of Law, and Judgment.

II.

The Judgment is contrary to law.

III.

The evidence is insufficient to support the Findings of Fact that the plaintiffs and cross-defendants Stanley B. Houck, Ruby E. Edling, Wilma M. Shepard, Hattie M. Houck, Ruth M. Hebbard, Minnie N. McKenzie, Howard H. McKenzie, and Veronica K. Ghostley, made a discovery on any of the claims prior to the 24th day of November, 1945.

IV.

The evidence is insufficient to support the Finding that the plaintiffs and cross-defendants Stanley B. Houck, Ruby E. Edling, Wilma M. Shepard, Hattie M. Houck, Ruth M. Hebbard, Minnie N. McKenzie, Howard H. McKenzie, and Veronica K. Ghostley, complied with Sec.

tions 2304 and 2305 of the Public Resources Code of the State of California.

V.

The evidence is insufficient to support the Finding that the plaintiffs and cross-defendants Stanley B. Houck, Ruby E. Edling, Wilma M. Shepard, Hattie M. Houck, Ruth M. Hebbard, Minnie N. McKenzie, Howard H. McKenzie, and Veronica K. Ghostley located any of the claims involved prior to the location thereof by the defendants and cross-claimants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna W. Wallace, James P. Delaney, Mary J. Delaney, and Irvin S. Barthel.

VI.

The evidence is insufficient to support the Finding that the plaintiffs and cross-defendants Stanley B. Houck, Ruby E. Edling, Wilma M. Shepard, Hattie M. Houck, Ruth M. Hebbard, Minnie N. McKenzie, Howard H. McKenzie, and Veronica K. Ghostley, at any time or at all, prior to the 24th day of November, 1945, did any work in or upon said claims in any manner or at all looking toward the discovery of minerals therein or thereon, or in an attempt to comply with Sections 2304 and 2305 of the Public Resources Code of the State of California.

VII.

The evidence is insufficient to support the Finding that the plaintiffs and cross-defendants Stanley B. Houck, Ruby E. Edling, Wilma M. Shepard, Hattie M. Houck, Ruth M. Hebbard, Minnie N. McKenzie, Howard H. McKenzie, and Veronica K. Ghostley, made discovery of minerals in and upon said claims prior to the time that the said defendants and cross-claimants Harris H. Ham-

mond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna W. Wallace, James P. Delaney, Mary J. Delaney, and Irvin S. Barthel, made such discovery.

VIII.

That the Court erred in finding that the plaintiffs and cross-defendants Stanley B. Houck, Ruby E. Edling, Wilma M. Shepard, Hattie M. Houck, Ruth M. Hebbard, Minnie N. McKenzie, Howard H. McKenzie, and Veronica K. Ghostley, expended the sum of \$1.00 per acre in and upon said claims pursuant to the requirements of Section 2305 of the Public Resources Code.

IX.

That the Court erred in finding that the plaintiffs and cross-defendants Stanley B. Houck, Ruby E. Edling, Wilma M. Shepard, Hattie M. Houck, Ruth M. Hebbard, Minnie N. McKenzie, Howard H. McKenzie, and Veronica K. Ghostley, complied with the requirements of Section 2304 of the Public Resources Code of the State of California.

X.

That the Court erred in finding that on the 7th day of September, 1945, the plaintiffs and cross-defendants Stanley B. Houck, Ruby E. Edling, Wilma M. Shepard, Hattie M. Houck, Ruth M. Hebbard, Minnie N. McKenzie, Howard H. McKenzie, and Veronica K. Ghostley, were the owners and entitled to the possession of those certain lands and premises described in paragraph V of the Findings of Fact and Conclusions of Law.

XI.

That there is no evidence in the record to support Findings XI and XII of the Findings of Fact and Conclusions of Law.

XII.

That the Court erred in refusing to permit the defendants and cross-claimants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna W. Wallace, James P. Delaney, Mary J. Delaney, and Irvin S. Barthel, to introduce evidence in support of their defense, that the plaintiffs and cross-defendants Stanley B. Houck, Ruby E. Edling, Wilma M. Shepard, Hattie M. Houck, Ruth M. Hebbard, Minnie N. McKenzie, Howard H. McKenzie, and Veronica K. Ghostley, were and are barred from asserting any claim against the property involved in this action because of the equitable doctrine that trustees and those bearing confidential relationships to others may not take advantage of that trustee relationship to the detriment of the beneficiaries thereof.

Dated: August 8, 1947.

MICHAEL F. SHANNON and
THOMAS A. WOOD

By Charles W. Wolfe

Attorneys for Defendants and Cross-Defendants J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker and John S. Patten

REYNOLDS & PAINTER and
WILLIAM W. KAYE

By Howard Painter

Attorneys for Defendants and Cross-Claimants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna W. Wallace, James P. Delaney, Mary J. Delaney, and Irvin S. Barthel

Received copy of the within Statement of Points Relied on by Appellants on Appeal this 9th day of October, 1947. Orris R. Hedges and Monta W. Shirley, by Orris R. Hedges, Attorneys for Plaintiffs (Appellees).

[Endorsed]: Filed Oct. 16, 1947. Paul P. O'Brien, Clerk.

No. 11749.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER, JOHN S. PATTEN, HARRIS H. HAMMOND, A. L. BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administratrix of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA M. SHEPARD, HATTIE M. HOUCK, RUTH M. HEBBERD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

Upon Appeals From the District Court of the United States
for the Southern District of California
Central Division

APPELLANTS' OPENING BRIEF.

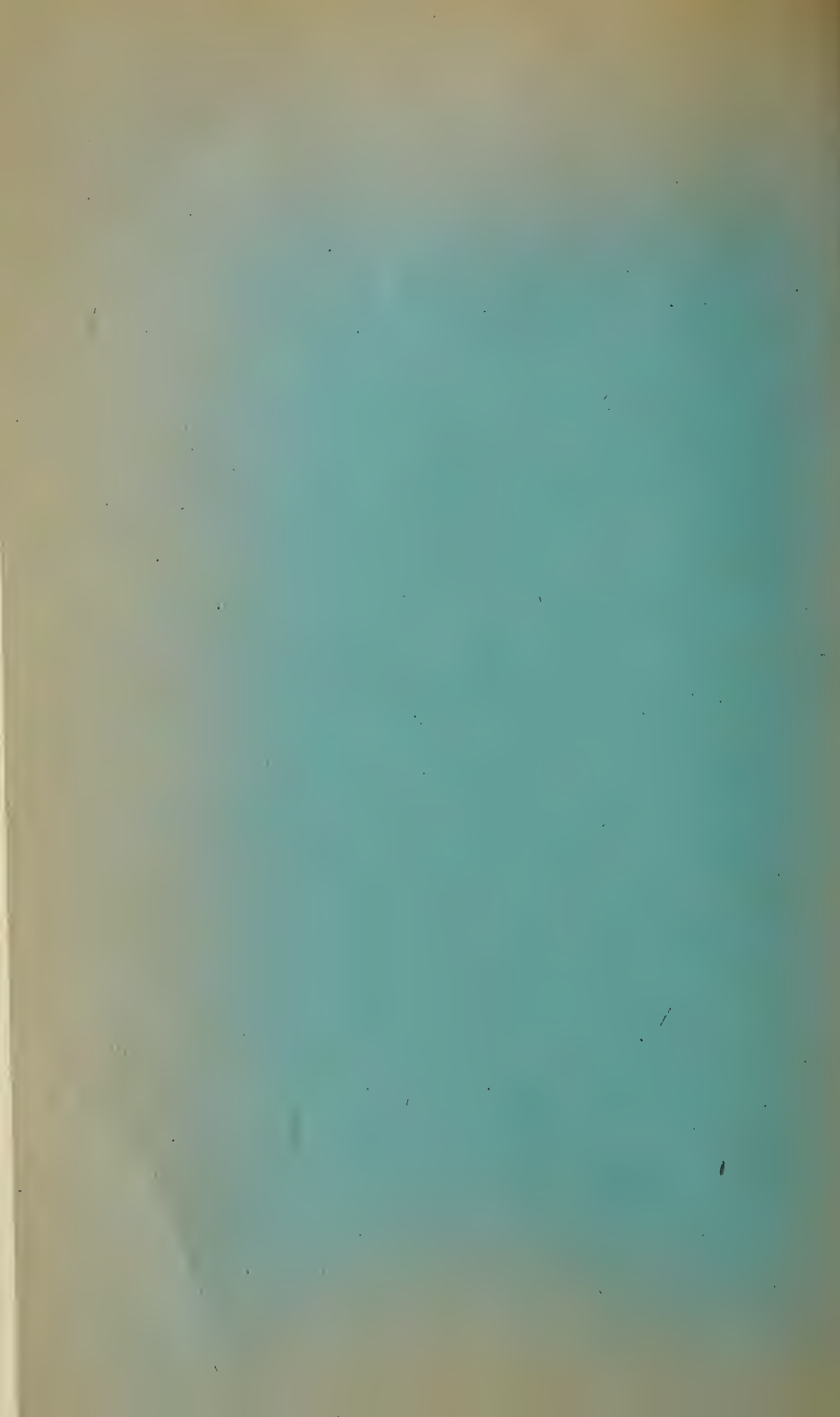
MICHAEL F. SHANNON,

THOMAS A. WOOD,

1017 Citizens National Bank Building, Los Angeles 13,

*Attorneys for Appellants, J. A. Jose, Olga Jose,
Corda Lancaster, William Lancaster, Ella
Jackman, John I. Jackman, George T. Renaker,
John S. Patten.*

FILED



TOPICAL INDEX

	PAGE
Statement of the pleadings.....	1
Jurisdiction of the District Court.....	3
Jurisdiction of the Circuit Court of Appeals.....	3
Statement of fact.....	3
Specifications of errors.....	7
Specification of Error No. 1. The court erred in finding that the Houck group was, on the 7th day of September, 1945, the owners of and entitled to the possession of the lands and premises as set forth in finding V of the transcript, page 45	8
Specification of Error No. 2. The court erred in finding that the plaintiffs fully complied with Sections 2303 and 2304 of the Public Resources Code of the State of California and with Sections 35 and 36 of Title 30, U. S. C. A., transcript, page 45.....	14
Specification of Error No. 3. The court erred in finding that the plaintiffs performed the necessary discovery work upon each of said claims within the time permitted by law, transcript, page 46.....	15
Specification of Error No. 4. The court erred in finding it to be true that the plaintiffs have expended many thousands of dollars to determine the worth and value of the clay in the development and growth of animal and vegetable life and in the elimination and prevention of pests of all kinds, transcript, page 46.....	15

Specification of Error No. 5. The court erred in finding it to be true that at all times mentioned in plaintiffs' complaint, the plaintiffs have at further cost and expense developed an extensive market for the use of said clay, and as a result of such expenditure and of the efforts so put forth by plaintiffs have established an extensive market and wide clientele through which and to whom said clay has been sold or otherwise distributed.....	17
Specification of Error No. 6. The court erred in finding that all of the denials of the answers of the defendants Jose et al., and all of the allegations and averments of said answers were untrue.....	17
Conclusion	18

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Beals v. Cone, 27 Colo. 473, 62 Pac. 948.....	10
Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735.....	13
Cole v. Ralph, 252 U. S. 286, 64 L. Ed. 567.....	9
Creede and C. C. M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 342, 49 L. Ed. 501.....	9, 10
Erhardt v. Board, 113 U. S. 527, 28 L. Ed. 1113.....	13
Lockhart v. Johnson, 181 U. S. 516, 45 L. Ed. 979.....	13
Tuolumne Consolidated Mining Co. v. Maier, 134 Cal. 583, 66 Pac. 863	10

STATUTES

Judicial Code, Sec. 24.....	3
Judicial Code, Sec. 128.....	3
Public Resources Code, Sec. 2303	7, 14
Public Resources Code, Sec. 2304	6, 7, 11, 12, 13, 14, 15, 17
Public Resources Code, Sec. 2305	6, 11, 12, 13, 14, 15, 17, 18
Public Resources Code, Sec. 2313	12
United States Code Annotated, Title 28, Sec. 41.....	3
United States Code Annotated, Title 28, Sec. 225.....	3
United States Code Annotated, Title 30, Sec. 23.....	9
United States Code Annotated, Title 30, Sec. 35.....	7, 9, 14
United States Code Annotated, Title 30, Sec. 36	7, 14
United States Code Annotated, Title 43, Sec. 416.....	4

TEXTBOOKS

1 Lindley on Mines, pp. 443, 444.....	10
2 Lindley on Mines, 3rd Ed., para. 336, p. 765.....	10

No. 11749.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER, JOHN S. PATTEN, HARRIS H. HAMMOND, A. L. BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administratrix of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA M. SHEPARD, HATTIE M. HOUCK, RUTH M. HEBBERD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

APPELLANTS' OPENING BRIEF.

Statement of the Pleadings.

This is an action brought by the plaintiffs against the defendants to quiet title to sixteen placer mining claims of 160 acres each, the claims being located in Township 14 South, Range 12 East, San Bernardino Base and Meridian, Sections 20, 21, 28 and 29, Imperial County, California, the complaint alleging that ever since on or about the 6th day of September, 1945, the plaintiffs have been and now are the owners and entitled to the possession of the lands and premises involved. In addition to the usual allegations to quiet title, there were included in the

complaint allegations that the plaintiffs had conducted experiments with respect to the clay located on the land; that the defendants had entered the premises and taken possession thereof, having employed agents and servants to extract the clay from the premises in violation of the plaintiffs' rights; that the defendants had threatened the plaintiffs and their employees with bodily injury if the plaintiffs or their agents entered upon the premises; that the plaintiffs had requested the defendants to cease and desist from such threats and to cease and desist from representations to the customers and clients and prospective customers and clients of the plaintiffs, and that the defendants had failed and refused to do so; that the value of the property was in excess of the sum of \$3,000.00. [Tr. pp. 2-9.]

The defendants, J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker and John S. Patten, answered [Tr. pp. 10-16 incl.], denying the allegations of the plaintiffs' complaint and alleging that said defendants were the owners of said land through valid locations thereof, and that the plaintiffs had no right, title or interest therein or thereto.

The defendants, Harris H. Hammond, A. L. Bergere, J. A. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary P. Delaney and Irving S. Barthel, answered and counterclaimed. These defendants denied the material allegations of plaintiffs' complaint and alleged that they were the owners of and entitled to the possession of the property involved, and by way of counterclaim asked that their title to the property be declared good and valid. [Tr. pp. 19-25 incl.]

Subsequently these same defendants filed a cross-complaint in which they sought to have their title quieted as

against the remaining defendants. [Tr. pp. 26-29 incl.] To this cross-complaint, the cross-defendants, J. A. Jose et al., answered denying the material allegations of the cross-complaint, and asked that the title of the cross-defendants in said land be declared good, valid and free of each and every claim of cross-complainants. [Tr. pp. 30-31.]

Jurisdiction of the District Court.

The jurisdiction of the District Court was invoked by reason of diversity of citizenship between the plaintiffs and defendants, and by the allegation that the matter in controversy, exclusive of interest and costs, was in excess of the sum of \$3,000.00.

Judicial Code, Section 24;

U. S. C. A., Title 28, Section 41.

Jurisdiction of the Circuit Court of Appeals.

The jurisdiction of the Circuit Court of Appeals is invoked pursuant to *Judicial Code*, Section 128, Title 28, *U. S. C. A.*, Section 225.

Statement of Fact.

For the purposes of this brief, the plaintiffs will be referred to herein as the Houck group, the defendants and cross-complainants as the Hammond group, and the defendants and cross-defendants as the Jose group.

During the year 1937, the Jose group located the land here involved as placer claims and were thereafter continuously in possession until the 7th day of September, 1945. The Jose group were without knowledge of the fact that the land involved had been withdrawn from entry, pursuant to an order of the Secretary of the In-

terior, dated October 19, 1920, under the first provision of Section 416, Title 43, *U. S. C. A.*, and was, therefore, not land upon which mineral locations could be made.

On July 6, 1945, an order was made by the Secretary of the Interior, opening the lands to entry as of ten A. M., September 7, 1945. [Tr. p. 239, Pltf. Ex. 47.] On September 7, 1945, the Houck group and the Hammond group were on the property at the hour fixed by the Secretary of the Interior for the opening of the lands, and each group started to post notices of location, staking the sixteen claims here in litigation. Both groups placed notices of location on all sixteen claims on the 7th day of September, 1945. No work other than the posting of the notices was done on this day.

H. W. Lewis, representing the Houck group, returned to the property sometime in October, examined the location notices and left. Thereafter he was on the property several times for the purpose of examining the location notices, and in either the last week in November or the first week in December of 1945, he commenced doing discovery work on the claims upon which the Houck group had placed notices of location on September 7, 1945. [Tr. pp. 133-135.] There was no testimony that there had been a discovery of mineral on any of the claims by any member of the Houck group or anyone acting on their behalf prior to the last week of November or the first week of December, 1945.

Commencing either in the last week of November or the first week in December, 1945, Lewis, representing the

Houck group, entered the premises and performed work on each of the claims upon which location notices were placed on September 7, 1945. Lewis testified that the minimum amount of work was done on each claim [Tr. p. 143]; that there was expended on each claim the sum of \$160.00.

Plaintiffs introduced in evidence a time book [Tr. p. 153, Plaintiffs' Exhibit 45]. Lewis testified that this time book contained a complete list of the men employed and a correct statement of the amount of money expended for the work performed on the claims. The time book shows the total amount of money spent for labor performed on the claims to be the sum of \$2085.90.

The Hammond group returned to the property for the purpose of doing discovery work on November 4, 1945, and between November 5th and November 11th, 1945, made discovery on each of the claims. [Tr. p. 326.] This work was supervised by the witness, William E. Wilson. [Tr. p. 328.] The work was done with a bulldozer and carry-all operated for five days. [Tr. p. 334.] Two men were employed. [Tr. p. 347.]

The Jose group, after the time for compliance with the state statutes had expired, entered in and upon the property and performed discovery and development work and made location pursuant to the federal and state statutes. [Tr. pp. 309, 320, 321, 390-398.]

No evidence was offered by the plaintiffs in support of the allegations of their complaint that they had expended any money or employed chemists or other scientists

to determine the value of the clay. No evidence was offered that the defendants or any of them had, in any manner or at all, interfered with the plaintiffs in the development of the property or had made representations to plaintiffs' customers or clients or to their prospective customers or clients. No evidence was offered that the defendants had, in any manner or at all, violated the rights of the plaintiffs other than by the performance of discovery and location in and upon the property, if the plaintiffs had any rights.

The questions involved on this appeal by the Jose group are:

1. Did the plaintiffs make valid locations in the manner and form prescribed by the mining laws of the United States and by the statutes of the State of California?
2. At the time that the plaintiffs claim to have done their discovery work, were the lands involved open to location?
3. Did the Hammond group, after making discovery, between the 5th and the 11th days of November, 1945, perform the amount of work required by Sections 2304 and 2305 of the *Public Resources Code* of the State of California?
4. Did the plaintiffs, during the last week of November or the first week of December, 1945, do the amount of work on the claims required by Sections 2304 and 2305 of the *Public Resources Code* of the State of California?

Specifications of Errors.

I.

The court erred in finding that the Houck group was, on the 7th day of September, 1945, the owners of and entitled to the possession of the lands and premises as set forth in finding V of the transcript, page 45.

II.

The court erred in finding that the plaintiffs fully complied with Sections 2303 and 2304 of the *Public Resources Code* of the State of California and with Sections 35 and 36 of Title 30, *U. S. C. A.* [Tr. p. 45.]

III.

The court erred in finding that the plaintiffs performed the necessary discovery work upon each of said claims within the time permitted by law. [Tr. p. 46.]

IV.

The court erred in finding it to be true that the plaintiffs have expended many thousands of dollars to determine the worth and value of the clay in the development and growth of animal and vegetable life and in the elimination and prevention of pests of all kinds. [Tr. p. 46.]

V.

The court erred in finding it to be true that at all times mentioned in plaintiffs' complaint, the plaintiffs have, at further cost and expense, developed an extensive market for the use of said clay, and as a result of such expenditure and of the efforts so put forth by the plaintiffs, have established an extensive market and wide clientele through which and to whom said clay has been sold or otherwise distributed. [Tr. p. 46.]

VI.

The court erred in finding that all of the denials of the Jose defendants' answers and all of the allegations and averments of said answers, adverse or inconsistent with the findings, are untrue. [Tr. p. 46.]

Specification of Error No. 1.

The Court Erred in Finding That the Houck Group Was, on the 7th Day of September, 1945, the Owners of and Entitled to the Possession of the Lands and Premises as Set Forth in Finding V of the Transcript, page 45.

The evidence offered by the plaintiffs with respect to the posting of notices of location was offered by the witness Harold W. Lewis. We make no point with respect to the posting of location notices by the Houck group and the Hammond group. We concede that both groups posted location notices on the 7th day of September, 1945, and that the notices as posted describe the claims properly upon which they were posted, and that duplicate copies of the notices were filed with the County Recorder of the County of Imperial, State of California.

The testimony of the plaintiffs with respect to discovery consisted of the testimony of the witness Lewis. Lewis testified that after September 7, 1945, he returned to the property in the middle of October for the purpose of examining the location notices; that he examined each notice and found it intact [Tr. p. 134]; that he returned to the property on various occasions from then on until the latter part of November; that in either the last week of November, 1945, or the first week of December, 1945, he commenced the discovery work on behalf of the Houck group. [Tr. p. 135.] No evidence other than this was offered by the plaintiffs with respect to discovery.

The Hammond group offered the witness Wilson with respect to discovery work. Wilson testified that he supervised the discovery work for the Hammond group, and that the work was done between the 5th and the 11th days of November, 1945, and that he discovered clay on each of the claims. [Tr. p. 326.] He testified that this

work consisted of the services of two men [Tr. p. 347], a bulldozer and a carry-all for a period of five days. [Tr. p. 334.] This presents the question of who first made discovery and what rights came into existence in favor of the group first making the discovery.

The rule of law is settled beyond controversy that discovery is the basic requisite to a valid location.

U. S. C. A., Title 30, Section 23.

Placer claims are subject to entry under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims.

U. S. C. A., Title 30, Section 35.

Location is the act or series of acts whereby the boundaries of a claim are marked, etc., but it confers no rights in the absence of discovery, both being essential to a valid claim.

Cole v. Ralph, 252 U. S. 286, 64 L. Ed. 567.

A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the Acts of Congress and the local laws and regulations.

Creede and C. C. M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 342, 49 L. Ed. 501.

The order in which the several acts required by the law are to be performed is non-essential in the absence of intervening rights. The marking of the boundaries may precede the discovery or the discovery may precede the marking, but if both are completed before the rights of another intervene, the earlier act will inure to the benefit of the locator; if the boundaries are marked before dis-

covery, the location will date from the time discovery is made.

Creede and C. C. M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 342, 49 L. Ed. 501.

Priority of discovery gives priority of right against naked location and possession without discovery.

2 *Lindley on Mines*, 3rd Edition, para. 336, page 765.

Where location is made without discovery, the land remains public domain until there be a discovery.

Tuolumne Consolidated Mining Co. v. Maier, 134 Cal. 583, 66 Pac. 863.

Where a location and record were made with no discovery, a subsequent discovery will not relate back and cut out an intervening location with discovery.

Beals v. Cone, 27 Colo. 473, 62 Pac. 948.

The discovery of mineral, not the posting or the filing of the certificate of location, nor the date recited therein, is the inauguration of a locator's rights.

Creede and C. C. M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 342, 49 L. Ed. 501;

1 *Lindley on Mines*, pages 443, 444.

The record here discloses without contradiction that the Houck group neither made nor attempted to make a discovery on the property until the latter part of November or the first part of December, 1945; that the Hammond group made a discovery on all of the claims between November 5th and November 11th, 1945. Under the authorities cited above, this discovery made the Hammond

group's location of the sixteen claims effective as of the dates between November 5th and November 11th, 1945. Under the United States statutes, this discovery was sufficient to make a valid location and to take the claims out of the public domain. The United States statutes do not require additional work, simply the discovery and the posting of the location notices. The statutes of the State of California, however, do require additional work before there can be a valid location. With reference to a placer mining claim, Sections 2304 and 2305 of the *Public Resources Code* provide:

Section 2304:

“Improvement of claims: Excavation of shaft, tunnel or open cut. (a) (Discovery shaft, tunnel, adit or open cut.) Within ninety days after the date of location of any lode mining or placer claim hereafter located, the locator or locators thereof shall sink a discovery shaft upon the claim to a depth of at least ten feet from the lowest part of the rim of the shaft at the surface, or shall drive a tunnel, adit, or open cut upon the claim to at least ten feet below the surface.

(b) (Open cut on placer claim.) In lieu of the discovery work required by paragraph (a) of this section, the locator of a placer mining claim may, within ninety days of the date of location, excavate an open cut upon the claim, removing from the cut not less than seven cubic yards of material. (Enacted 1939; Amended by later act passed at same session, Stats. 1939, ch. 1104, pp. 1, p. 3037.)”

Section 2305:

"Same: Additional work on certain placer claims: Nature and extent of work: Construction of section. Within ninety days after the date of location of any placer mining claim hereafter located containing more than twenty acres, the locator or locators thereof shall perform at least one dollar's worth of work for each acre included in the claim. This work may all be done at one place on the claim if so desired, and shall be actual mining development work exclusive of cabins, buildings, or other surface structures. Nothing in this section shall be construed as a modification of the requirements of section 2304 of this code. (Enacted 1939.)"

And Section 2313 provides for the recording of a copy of the notice of location, together with a statement of the markings of the boundaries and of the performance of the required discovery work, in the office of the County Recorder of the county in which such claim is situated.

Under Section 2305 of the *Public Resources Code*, after making discovery, the Hammond group were given ninety days in which to perform at least one dollar's worth of work for each acre included in the claim, and to perform the work required by Section 2304. During this period of ninety days, the land was not in the public domain and not subject to location by either the Houck group or the Jose group, and if the Hammond group complied with Section 2304 and Section 2305 of the *Public Resources Code* of the State of California, they have and have had

since November 5th to 11th, 1945, the right to the possession of the mining claims involved as the valid locators thereof. During the period of ninety days allowed by the state statutes to complete the discovery and location work, the lands were not open to location by any other person. During this period, no valid rights could be initiated for the reason that the law did not allow it.

Lockhart v. Johnson, 181 U. S. 516, 45 L. Ed. 979;
Erhardt v. Board, 113 U. S. 527, 28 L. Ed. 1113.
Belk v. Meagher, 104 U. S. 279, 287, 26 L. Ed.
735.

Upon the failure of the Hammond group to do the work required by Sections 2304 and 2305 within the ninety days' period, the land again became open to entry. The question of whether or not they did this work was not found by the trial court. The evidence offered as compliance with these two sections of the *Public Resources Code* consisted of the testimony of the witness Wilson that he supervised the work [Tr. p. 328]; that the work was done with a bulldozer and a carry-all operated for five days [Tr. p. 334]; and that two men were employed. [Tr. p. 347.]

The finding by the court that the Houck group was, on the 7th day of September, 1945, the owners of and entitled to the possession of those certain lands and premises as set forth in finding V, transcript of record, page 45, is not only not supported by the evidence, it is contrary to the established rules of law as shown by the cases cited above.

Specification of Error No. 2.

The Court Erred in Finding That the Plaintiffs Fully Complied With Sections 2303 and 2304 of the Public Resources Code of the State of California and With Sections 35 and 36 of Title 30, U. S. C. A., Transcript, page 45.

As pointed out under Specification of Error No. 1, the lands here involved were not open to entry and location during the last week of November and the first week of December, 1945, so that the finding that the plaintiffs complied with Sections 2303 and 2304 of the *Public Resources Code* of the State of California and Sections 35 and 36 of Title 30, *U. S. C. A.*, is not supported by the evidence; it is contrary to the evidence, and such finding, both under the facts and the law, is erroneous. In addition to this, the evidence shows that the plaintiffs did not perform the work required by Sections 2304 and 2305 of the *Public Resources Code*. The plaintiffs introduced in evidence a time book [Tr. p. 153, Pltf. Ex. 45], showing the total amount of money spent for labor performed on the claims to be the sum of \$2085.90. There was a total of 2560 acres involved. There was no evidence offered to show what particular sum was spent on any individual claim. The *Public Resources Code*, Section 2305, requires that at least one dollar's worth of work be done for each acre contained in the claim, and that the requirements of Section 2304 be complied with. Lewis, testifying on behalf of the plaintiffs [Tr. p. 143], testified that the minimum amount of money was spent on each claim, that is the sum of \$160.00. The record does not support this. \$160.00 was not the minimum amount of work required. It was required that in addition to at least one dollar's worth of work for each acre contained in the claim, the work required by Section 2304 of the *Public*

Resources Code be done. And on a placer claim located pursuant to Section 2305 of the *Public Resources Code*, it was necessary that a discovery shaft be sunk to a depth of at least ten feet from the lowest part of the rim of the shaft at the surface or a tunnel, adit or open cut be driven on the claim to at least ten feet below the surface. This was not done.

Specification of Error No. 3.

The Court Erred in Finding That the Plaintiffs Performed the Necessary Discovery Work Upon Each of Said Claims Within the Time Permitted by Law, Transcript, page 46.

The points made under Specifications of Error Nos. 1 and 2 cover the error of Specification No. 3. That is to say, the land was not open to entry when the plaintiffs did their discovery work. The plaintiffs did not do the amount of work required by Sections 2304 and 2305 of the *Public Resources Code* of the State of California.

Specification of Error No. 4.

The Court Erred in Finding It to Be True That the Plaintiffs Have Expended Many Thousands of Dollars to Determine the Worth and Value of the Clay in the Development and Growth of Animal and Vegetable Life and in the Elimination and Prevention of Pests of All Kinds, Transcript, page 46.

The only evidence with respect to whether or not anything had been done with respect to this clay is found in the testimony of the witness Lewis, and it is as follows:

“The Court: At what depth does this clay that you speak of being so valuable usually is found?”

The Witness: Some places, Judge, it is that far under the ground and some places it is quite a few feet under the ground.

The Court: Is that something like the stuff they use for building?

The Witness: No, no. This is altogether different. I have a piece of it in my pocket.

The Court: And the over-burden varies from place to place?

The Witness: Yes. That is a piece of it.

The Court: What is it used for?

The Witness: It is used as a food supplement for cattle.

The Court: In what form? Do you grind it?

The Witness: It is ground and they use a small percentage with the grain feed.

The Court: Does it have nutritional qualities? I know horses sometimes take a mouthful of dirt. I didn't know they found it generally.

The Witness: From what the biochemists say, I do not think this develops any nutritional qualities. I think what it does is re-establish in the animal the minerals that are needed for assimilation.

The Court: To establish a balance?

The Witness: Yes. Like the irons and calciums, etc." [Tr. pp. 137, 138.]

That was all of the testimony that was offered to support the finding.

Specification of Error No. 5.

The Court Erred in Finding It to Be True That at All Times Mentioned in Plaintiffs' Complaint, the Plaintiffs Have at Further Cost and Expense Developed an Extensive Market for the Use of Said Clay, and as a Result of Such Expenditure and of the Efforts so Put Forth by Plaintiffs Have Established an Extensive Market and Wide Clientele Through Which and to Whom Said Clay Has Been Sold or Otherwise Distributed.

There was not one word of testimony offered with respect to the facts set forth in the foregoing finding.

Specification of Error No. 6.

The Court Erred in Finding That All of the Denials of the Answers of the Defendants Jose et al., and All of the Allegations and Averments of Said Answers Were Untrue.

The defendants Jose, *et al.*, offered in evidence their notices of location, properly recorded, showing that on each claim they had performed not only \$160.00 worth of work, but that in addition thereto they had sunk a shaft to a depth of at least ten feet below the lowest part of the rim at the surface, and had removed over and above the \$160.00 requirements not less than sixty cubic yards from each claim [Tr. pp. 310-312; Deft. Ex. U, Tr. p. 319]; that they had spent in addition to the \$2560.00 necessary to cover the requirements of Section 2305 of the *Public Resources Code*, the sum of \$1367.00 covering the requirements of Section 2304 of the *Public Resources Code* [Tr. pp. 307-323]. The Jose defendants also offered in evidence the testimony of Joseph F. Golden, a registered civil engineer, his testimony commencing on

page 371 and going through to page 390, showing that the proper work was done on each location, the size of each hole dug, and the number of cubic yards removed. The Jose defendants offered the testimony of Charles H. Bratton commencing at page 390 to page 398, showing that Bratton had performed the work on each claim, and the value of the work done; that all of this work was performed in February and March of 1946, after the ninety days had expired in which the Hammond group had the right under Section 2305 of the *Public Resources Code* to complete their location.

Conclusion.

It is respectfully submitted that in the respects above assigned, the trial court committed error, that the findings of fact, conclusions of law and judgment are contrary to the facts and to the law, and that the judgment should be set aside and reversed.

MICHAEL F. SHANNON,

THOMAS A. WOOD,

Attorneys for Appellants, J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker, John S. Patten.

No. 11749

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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Appellants,

vs.

HATTIE M. HOUCK, as Administrator of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA N. SHERARD, HATTIE M. HOUCK, RUTH M. HEBBARD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

BRIEF OF APPELLEES.

ORRIS R. HEDGES,

MONTA W. SHIRLEY,

756 South Broadway, Los Angeles 14,

Attorneys for Appellees.

JUL - 3 1948

TOPICAL INDEX

	PAGE
Introduction	1
Statement of pleadings and facts disclosing jurisdiction.....	2
Statement of the case.....	3
Argument	9
Introduction	9
Point I of appellants Hammond, et al.....	9
Point II of appellants Hammond, et al.....	9
Point III of appellants Hammond, et al.....	18
Point IV of appellants Hammond et al.....	23
Point V of appellants Hammond, et al.....	25
The Jose brief.....	26
Conclusion	28

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Alaska Consolidated Oil Fields v. Rains, 54 F. (2d) 868.....	19
Book v. Justice Co., 58 Fed. 106.....	16, 17
Cameron v. United States, 252 U. S. 450, 40 S. Ct. 410.....	14
Cascaden v. Bartolis, 162 Fed. 268; affirm'g 146 Fed. 741.....	17
Chrisman v. Miller, 197 U. S. 313, 25 S. Ct. 468.....	9, 10, 15, 25
Continental Mutual Oil Co. v. United States, 245 Fed. 524.....	30
Conway v. Hart, 129 Cal. 480, 62 Pac. 44.....	19
Garibaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425.....	15
Hall v. McKinnon, 193 Fed. 572.....	12
Kramer v. Gladding, McBean & Co., 30 Cal. App. (2d) 98, 85 P. (2d) 552.....	14
Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176.....	17
Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673.....	15
Shoshone Company v. Rutter, 87 Fed. 807; aff'd 177 U. S. 505	16
Steele v. Tanana Mines Co., 148 Fed. 678,.....	11, 12
Swanson v. Sears, 224 U. S. 180, 32 S. Ct. 455.....	24, 26
Thompson v. Spray, 72 Cal. 528, 14 Pac. 182.....	30
Toulumne Consolidated Mining Company v. Maier, 134 Cal. 583, 66 Pac. 863.....	12
United States v. McCutcheon, 238 Fed. 575.....	10
United States v. Sherman, 288 Fed. 497.....	19

STATUTES

California Public Resources Code, Sec. 2303.....	6, 23, 28
California Public Resources Code, Sec. 2303(a)	18, 20
California Public Resources Code, Sec. 2303(b).....	20
California Public Resources Code, Sec. 2304.....	28
California Public Resources Code, Sec. 2304(b).....	5
California Public Resources Code, Sec. 2305.....	5, 6, 21

	PAGE
California Public Resources Code, Sec. 2305(b).....	6
California Public Resources Code, Sec. 2313.....	23
Judicial Code, Sec. 24 (24 U. S. C. A. (41)).....	2
Judicial Code, Sec. 128 (28 U. S. C. A. (225)).....	2
Judicial Code, Sec. 238 (28 U. S. C. A. (345)).....	2
United States Code Annotated, Title 30, Sec. 35.....	28
United States Code Annotated, Title 30, Sec. 36.....	28

TEXTBOOKS

Costigan's Mining Law, Sec. 43, p. 154.....	10
40 Corpus Juris, Mining and Materials, Sec. 177.....	13
40 Corpus Juris, Mining and Materials, Sec. 183.....	14
2 Lindley on Mines, p. 763.....	14
2 Lindley on Mines, p. 806, Sec. 345.....	10
2 Lindley on Mines, p. 821, Sec. 356.....	20
2 Lindley on Mines, p. 953, Sec. 408.....	18
2 Lindley on Mines, pp. 1579-1580, Sec. 635.....	22
Ricketts, American Mining Law, Sec. 591.....	16
Ricketts, American Mining Law, Sec. 596.....	17
Ricketts, American Mining Law, Sec. 602, Footnote 37.....	10
Ricketts, American Mining Law, Sec. 695.....	20
Ricketts, American Mining Law, Sec. 698.....	30
Ricketts, American Mining Law, Sec. 760.....	25



No. 11749

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER, JOHN S. PATTEN, HARRIS H. HAMMOND, A. L. BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administrator of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA N. SHERARD, HATTIE M. HOUCK, RUTH M. HEBBARD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

BRIEF OF APPELLEES.

Introduction.

Through error, in the printing of the transcript or otherwise, two of the appellees' names were misspelled, and we hereby request that the record be corrected to show the name of Wilna N. Sherard in place of Wilna M. Shepard, and Ruth M. Hebbard in place of Ruth M. Hebberd. We would also like to point out that while H. W. Lewis appears as an appellee herein, he is not one of the original locators and appears in this proceeding as attorney-in-fact for the other appellees [R. 75-80].

Wherever in this brief any authority is quoted in italics, such emphasis has been supplied by appellees, unless otherwise indicated.

There are three sets of claimants involved in the case at bar, one group being the appellees (hereinafter, in the interest of brevity, called the Houck group), appellants Harris H. Hammond, *et al.* (hereinafter, in the interest of brevity, called the Hammond group), and appellants J. A. Jose, *et al.* (hereinafter, in the interest of brevity, called the Jose group).

This brief shall be in response to both briefs filed by each group of appellants herein.

Statement of Pleadings and Facts Disclosing Jurisdiction.

(1) The statutory provisions sustaining the jurisdiction of the District Court of the United States are found in Judicial Code of the United States, Section 24, as amended (28 U. S. C. A. (41)). Jurisdiction of this Court is based upon Judicial Code, Section 128, amended (28 U. S. C. A. (225)); Judicial Code, section 238 (28 U. S. C. A. (345)).

(2) The Complaint alleges that jurisdiction is founded on diversity of citizenship, the existence of a Federal question, and the amount in controversy. These allegations were admitted by the appellants and stipulated to in the trial. The summary of the pleadings by appellants Hammond, *et al.*, is substantially correct.

Statement of the Case.

The land involved herein contains deposits of montmorillonite clay, which has value as a food supplement for poultry, cattle and agricultural products [R. 137].

On October 22, 1920, the lands involved herein were, by order of the Secretary of the Interior, withdrawn from entry [R. 236] and by Executive Order dated August 21, 1941, were withdrawn by the War Department to be used for combat firing ranges and maneuvering purposes [R. 237]. From the period beginning October 19, 1920, to July 6, 1945, the land involved herein was not open for entry or for the filing of any mining claims [R. 237]. The lands were reopened for entry pursuant to order of the Secretary of the Interior dated July 6, 1945, to be effective on the 63rd day from that date, pursuant to an application made therefor by appellees herein [R. 238-239].

No issue of discovery was tendered at the trial of this matter by the pleadings, evidence or argument. (See paragraph VI of Complaint [R. 4] and paragraph III of defendants' Answer thereto [R. 10]. Also, see Stipulation at beginning of the trial [R. 63].) In view of the fact that this seems to be the principal point of appellants Hammond, *et al.*—that there was no evidence of the discovery of mineral by appellees—we consider the failure to raise such issue at the trial to be *of* prime importance.

If there is any question in this case of discovery (which, it is the view of appellees, there is not), the fact that appellees herein applied to the Land Department for opening of the land for mineral entry presents strong evidence of such discovery. It is made even more compelling by the action taken upon the application of appellees by the

Department of the Interior, in reopening the lands for mining entry, as requested by appellees, as aforesaid.

Mr. Harold W. Lewis, attorney-in-fact for appellees herein, went upon the property the first time in 1942. He was on the property many times after that and before the locations were filed [R. 84]. While he was on the property, he picked up some samples of the land, brought them in and had them analyzed by Smith-Emory. According to that analysis, the material contained the montmorillonite clay "that we have referred to in ^{the} Stipulation on the property" [R. 143]. This, it is to be observed, is the same montmorillonite clay referred to in the request to the Land Department by Stanley B. Houck, *et al.*, to reopen the lands for mining entry [R. 241].

According to the order of the Secretary of the Interior reopening the land for entry for mining locations, the first entry was permitted sixty-three days after July 6, 1945, at 10:00 a. m. [R. 240]. Appellees were not certain whether the sixty-third day fell on the 6th or the 7th of September, 1945. Out of an abundance of precaution, appellees filed Notices of Location on both days [R. 406]. When Harold W. Lewis (as attorney-in-fact for appellees herein) and Stanley B. Houck went upon the property on September 6, 1945, with the surveyors, they had with them for each of the locations involved herein a board about four inches wide and about four feet long, on each of which they had painted with black paint the name of the claim, and the legal description thereof, and they also took with them pint Mason jars to be placed in holes at the base

thereof. They first went to Tropical No. 2, drove one of the posts with the name and legal description of the property painted thereon into the ground, dug a hole at the base thereof about five inches deep and placed one of the Mason jars therein, and put the duplicate of the mining location [Appellees' Exhibit 6] inside the Mason jar, after dating it, timing it and witnessing it, and put the cap back on the jar [R. 118, 119]. They went through the same procedure with all the other claims [R. 121-126]. On September 7th, 1945, they again went upon the property, observed that the posts driven into the ground the day previous and the Mason jars at the foot thereof, were still there, filed new claims, witnessed the signatures, placed the time on each notice, and placed them in the Mason jars that were already on the property. [R. 126]. This was done on every claim [R. 126-132, 218].

Thereafter, Mr. Lewis went upon the property on several occasions, checked to see that every Notice of Location was in the jar, and found that they were [R. 133-134]. Right after Thanksgiving, 1945, appellees took by truck some forty men from Brawley in transportation furnished by appellees to commence the development work required by Sections 2304(b) and 2305 of the Public Resources Code of the State of California [R. 135, 136]. This work was done by pick and shovel [R. 136]. The day labor was paid for on the basis of \$1.00 per hour [R. 138]. This was a very low rate for labor to go into the desert [R. 156]. By this type of labor, appellees removed from the sixteen mining claims involved herein, the

total of 1,436.10 cubic yards of material [R. 69-74]. In removing this material from the open cuts upon each claim, appellees moved more than the seven cubic yards of material required by Section 2305(b) of the Public Resources Code of California, and performed more than one dollar's worth of work for each acre included in the claim, as required by Section 2305 of that Code [R. 138-142], expending in connection with this development work a little over \$2,600.00, the required amount being, at \$1.00, \$2,560.00 [R. 142]. The money was expended for actual mining development work ^{exclusive} inclusive of cabins, buildings or other structures [R. 142]. The money was paid to the Bank of America at Brawley by cashier's check in the amount of \$2,500.00, and the laborers were paid in the bank in the presence of officers thereof [R. 176-179, 180-182].

The Hammond group went upon the property on September 6th, 1945, with their engineer, to ascertain the locations of the government monuments or stakes designating the section corners [R. 267-269]. On September 7th, 1945, the Hammond group again came upon the property with claims prepared in Colorado, and upon Colorado forms [R. 348], not containing a statement of the markings and boundaries of the property, as required by Section 2303 of the Public Resources Code of California [R. 348-349], which location notices had been tacked upon stakes, which stakes they drove into the ground or around the base of which they erected monuments to hold them in place [R. 258, 271-306]. The appellants did not place

any receptacle in the ground below said notices nor did they take any steps to prevent their Notices of Location from blowing away or being destroyed or obliterated by the elements, the evidence being that there is considerable wind in this area, the wind having partially filled with sand some of the excavations made in the performance of the discovery work [R. 380, 383]. Even upon the purported Notice of Location, which the appellants succeeded in discovering as still upon the property in December of 1946 [R. 253], and which they brought into Court, there was no evidence that the same had ever been signed, although the defendants contended that it had been signed and the signatures erased by the weather [R. 254, 380]. The forms used by the said appellants did not conform to the statute which requires that there must be a statement of the markings and boundaries of the claim [R. 348]. The originals of these documents were recorded at 10:00 a. m. on the 7th of September, 1945, and contained not only no statement of markings and boundaries, but also, of course, no statement of the discovery work thereon [R. 348-349]. They were not offered in evidence to show that the appellants complied with any statute, but only to show that appellants had in evidence a duplicate of that which was posted on the property [R. 349]. The Amended Notices of Location were offered in evidence and received over appellees' objection, that intervening claims had been filed between the time of the original location notice (which appellants Hammond, *et al.*, admit were invalid) and the time of the filing of the amended claim [R. 352].

The defendants Jose, *et al.*, in filing their claims, simply made excavations in the ground and buried their notices in tin cans on the property on January 17, 1946, recording duplicates thereof on the same day [R. 308-318].

As to discovery work, the appellants Hammond, *et al.*, in November of 1945, caused a mining engineer to come upon the property and locate the area where exploratory work on each claim was to be done, and caused a D-8 bulldozer, a Carryall, and incidental oiling and repairing equipment, to come upon the property and excavate quantities of earth therefrom [R. 324-333]. He stated that a man with a bulldozer could remove the quantity of material to which he testified for fifty cents per cubic yard, whereas, doing the same work by hand labor, would run close to \$3.00 per cubic yard [R. 345-346]. There was no evidence presented at all by appellants Hammond as to the amount actually expended by them in performing the said work, nor was any evidence presented as to what, if any, money was expended, and how, or under what circumstances.

A witness for the Jose group testified that moving dirt with a bulldozer and carryall in the Imperial Valley could be done for thirty cents per cubic yard [R. 397].

As to the development work by the appellants Jose, *et al.*, they paid out \$1,367.00 for the development work they performed [R. 321], approximately \$700.00 of which was paid to Mr. Jose, one of the appellants [R. 321], the remainder being paid for operating the bulldozer [R. 321-322].

ARGUMENT.

Introduction.

We shall discuss the brief of the Hammond group first and then the brief of the Jose group. First of all, we desire to discuss the proposition made by appellants Hammond, *et al.*, in their argument.

Point I of Appellants Hammond, et al.

In general, we have no argument with appellants' first proposition, that in a suit to quiet title, the plaintiff must establish his own title and cannot recover upon the weakness of the defendant's title. This rule, however, we think is somewhat modified on the question of discovery of mineral prior to location in actions to quiet title to mining claims, as was said in the case of *Chrisman v. Miller*, 197 U. S. 313, 323 (25 S. Ct. 468) (a case that arose in California, and is cited by appellants):

"It is true that when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. . . ."

With this qualification of appellants' first contention, we take no issue with them thereon. We think it is not untimely at this point, however, to call attention to appellants' haste in referring to the weaknesses of their own title at the very outset of their argument, and protesting

appellees' right to recover thereon. We shall show that appellees did not recover upon such weaknesses, were fully entitled to recover upon good and mining-like locations, discovery work and proper filings, and that appellants all fall far short of such compliance.

Point II of Appellants Hammond, et al.

In the second point of appellants Hammond, *et al.*, the argument is presented that a claimant must establish a discovery by him of minerals. We have already called attention to the case of *Chrisman v. Miller, supra*, and have pointed out some of the weaknesses in the appellants' position. We shall likewise show that appellants Hammond are confused between discovery of minerals *before* location, and *discovery work after* location.

So far as we were able to ascertain, all well-known authors upon the subject of mining law point out the distinction between the two. In Costigan's Mining Law, page 154, Sec. 43, is found the following:

"The discovery must be distinguished from the discovery shaft required by state statutes as part of the location. The discovery shaft is one of the acts of location which normally follows location."

The same distinction is set forth in Vol. 2, Lindley on Mines, page 806, Sec. 345.

Ricketts, American Mining Law, Sec. 602, footnote number 37, calls attention to the same distinction.

Appellants are confused as to the correct definition of "discovery." Before there can be a location notice, there must be a discovery of minerals. This is not the kind of discovery that was being disussed in the case of *U. S. v. McCutcheon*, 238 Fed. 575, relied upon by appellants

Hammond et al., that being an oil and gas case, and involving the discovery work *after* location. Appellants Hammond omit from the portion of the opinion quoted in their brief (p. 19) the following, which illustrates the point:

“This discovery, in its broad and comprehensive sense, is the doing or the accomplishing of that thing, with respect to the land sought to be appropriated, which serves to impress upon it the quality of being land which is open to appropriation or exploration, in the manner and pursuant to the law, sought to be made use of. And it may be said that, with becoming propriety, both judicial and departmental rulings have evinced a disposition to be liberal toward locators in the matter of the requirement as to what will suffice to constitute such a ‘discovery’ as to segregate the land sought to be selected from the public domain and invest it with the attribute of mineral land, and subject to private ownership or exploration, what discovery, then, will suffice to meet the requirements under the Act of 1897? Though under that act, entry and patent were to be obtained pursuant to the placer mineral laws, yet it must be remembered that upon location and ‘discovery,’ followed or accompanied by the expenditure of \$500.00, and upon application, patent from the government was to follow. R. S. §2325. (Comp. St. 1913 §4622).”

Appellants refer to the case of *Steele v. Tanana Mines Company*, 148 Fed. 678, 679 (C. C. A. 9) (agricultural lands), but fail to call attention to the language at page 680 thereof applicable here, as follows:

“ . . . When the controversy is between two mineral claimants, the rule respecting the sufficiency

of a discovery of minerals is more liberal than when it is between a mining claimant and one seeking to make an agricultural or other entry under the land laws. The reason for this distinction is said to be that, when land is sought to be taken out of the category of agricultural land, the evidence of its mineral character should be reasonably clear, while in respect to a controversy between rival claimants to mineral land, the question is simply which is entitled to priority."

The case of *Hall v. McKinnon*, 193 Fed. 572, 576, which appellants Hammond, *et al.* state is to the same effect as the *Tanana Mines* case, involves discovery work after the filing of the Notice of Location. (Staked by eight locators claiming 160 acres.) "Gold was discovered on this claim in August, 1905, in a shaft sunk to a depth of about 88 feet on or near the western boundary line as claimed by the defendants. This discovery was sufficient to support the location of an entire tract of 160 acres."

Appellants Hammond state that the California case of *Toulemne Consolidated Mining Company v. Maier*, 134 Cal. 583, 585 (66 Pac. 863), is to the same effect. Insofar as they see fit to quote the *Toulemne* case, that is correct. But that case involved a controversy between an owner of an easement over the mining land for a water ditch and a locator of the mining land. The court specifically there held (immediately following the portion cited by appellants):

"And, for the purposes of this case, it is unnecessary to decide whether such discovery must precede the posting and filing of the notices; for it may be here conceded that a previous location may be made

valid by a subsequent discovery of mineral; still there can be no valid claim to the land, and it must be treated as government land up to the time of such discovery. . . .”

Even at the expense of repetition, we wish to emphasize appellants’ failure to distinguish between the cases involving conflicting locators’ claims and conflicts between locators of mining claims and those of surface rights.

Appellants Hammond give a definition of discovery on pages 20-21 of their brief, and cite 40 Corpus Juris, Mining and Minerals, Sec. 177, as authority therefor. The entire paragraph referred to, and with which we have no quarrel, is as follows:

“What Constitutes Discovery. The mining statutes do not prescribe what is necessary to constitute a discovery, and no arbitrary rule as to what will constitute a sufficient discovery can be stated which will govern all cases, either in respect of lode claims or placer claims, *whether a discovery has been made being generally a question of fact for a jury to determine.* It may be stated generally, however, that the term ‘discovery’ as applied to a mining claim means the acquirement of knowledge that a vein or lode exists within the limits of the claim, or in case of a placer claim that it is reasonably valuable for such mining. And while it is not necessary that ore or mineral in paying quantities be found, it is well settled that mineral must be found under such circumstances and of such a character and quantity that a reasonably prudent man, not necessarily a skilled miner, would be justified in expending time and money developing it, with the reasonable expectation of finding mineral in paying quantities; mere indications of minerals are not sufficient.”

Cameron v. United States, 252 U. S. 450, 40 S. Ct. 410, cited by appellants Hammond as authority for the portion of the above reference that said appellants desire this Court to have, is cited by Corpus Juris as authority for the same.

While we herein have gone and are going to some extent to point out the failure of appellants Hammond to present the full authorities to parts of which they refer, we do not want this Court to lose sight of the proposition that in this action, being between rival mineral locators, no issue of discovery is involved.

In the same work (Corpus Juris, Mines and Minerals, Sec. 183), a discussion of what is meant by "discovery work," with which appellants seem to have confused discovery of minerals, is set forth. We feel certain we need not develop the distinction for the benefit of this Court.

Appellants Hammond state that the definition of discovery, as set forth by them, has been adopted by the District Court of Appeal of California in the case of *Kramer v. Gladding, McBean & Co.*, 30 Cal. App. (2d) 98, 104, 85 P. (2d) 552. That case is authority for the proposition that a locator does not have to *personally* discover minerals on the land; that if he knows that a prior locator has discovered minerals thereon, it is sufficient. (See also to same effect, Lindley on Mines, Vol. 2, p. 763.) The case also holds that when the locator (of a lode claim) finds rock in place containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. "It is the finding of the mineral in the rock in place, as distinguished from flat rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim." (Quoting from

Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 677.)

On page 22 of appellants Hammond's brief, they quote from the case of *Garibaldi v. Grillo*, 17 Cal. App. 540 (120 Pac. 425), as holding that where a locator prior to location took out two pans of dirt from the land which he was told by other parties contained gold in paying quantities, the trial court was justified in holding that there had been no discovery. Only one quotation from that case, wherein the Court there quotes from the appellant's brief filed therein, is necessary to dispose of any relevancy of that case to the facts of the case at bar:

"Plaintiffs say in their brief: 'It is not claimed that, prior to making the location under consideration, plaintiffs actually discovered gold in paying quantities upon the claim located. . . .'"

Appellants Hammond make reference (p. 22) to the case of *Chrisman v. Miller*, *supra*, as holding that it is not enough that there may have been some indications by outcroppings on the surface of existence of lodes or veins of rock in place bearing gold, etc., to justify their designation as "known" veins or lodes. In that case, the California trial court, having found that there was no discovery, and that finding having been sustained by the Supreme Court of California (140 Cal. 440), the holding was that the findings of fact of the State Courts were conclusive upon the United States Supreme Court.

As to sufficiency of discovery, in addition to the Stipulation which was entered into at the beginning of the trial to the effect that the value of the mineral deposits on the land is greatly in excess of the jurisdiction of the Court [R. 63], Mr. Harold W. Lewis, attorney-in-fact

for appellees, herein testified that he was first upon the land in 1942 and that he took samples therefrom and had them analyzed and found that they contained Montmorillonite clay [R. 143]. The witness for the appellants, William E. Wilson, a mining engineer, testified that the clay ran through the entire area, a narrow area of about 40 square miles [R. 341]. In addition to all this, appellees herein filed with the Land Department a letter requesting that the land be classified as mineral land, which letter appears in Book 56-D of the Serial Register of the District Land Office, Los Angeles, California, Serial No. 056831 [R. 240-241].

In addition to the fact that no issue was raised at the trial as to discovery, there was discovery by appellees in this case of clay in the area from which the trial court would certainly be justified in concluding that appellees had made discovery before filing Notice of Location, which is true in this case. The law does not intend that the locator of a mining claim shall determine the precise extent and character of the mineral or the continuity of the ore, and the existence of the rock in place bearing mineral, before he can make a valid location. (*Book v. Justice Company*, 58 Fed. 106; *Shoshone Company v. Rutter*, 87 Fed. 807; affirmed 177 U. S. 505.) Ricketts (American Mining Law, Sec. 591) has this to say about discovery:

“The term ‘discovery’ has a technical meaning in mining. It may be defined as knowledge of the presence of the precious metals within the lines of the location *or in such proximity thereto as to justify a reasonable belief in their existence.* . . .”

In the case of *Cascaden v. Bartolis*, 162 Fed. 268 (affirming 146 Fed. 741), it was held that while a mere possibility that ground claimed is valuable for mineral, or that there are mere indications of the existence of mineral in the ground, is not sufficient to justify a prudent person in expending money and work in exploration of it; yet, where the evidence shows the actual existence of mineral in the claim, and such evidence is of sufficient weight to submit to the jury upon the issue of discovery, the locator has a right to strengthen his proof upon any of the elements which enter into what is comprehended by "discovery." In doing so, he may supplement the showing that mineral actually did exist by introducing evidence of the fact that as a ground of justification for the expenditure of time and money, the adjacent ground in the immediate vicinity is rich in the same mineral, or that adjacent claims were developed into paying mines after development upon similar showings of mineral, or *that the geological conditions are so similar to that from the character of the mineral discovered, it is reasonable to expect to find mineral in valuable quantities in the exploitation of the ground state.*

Ricketts (American Mining Law, Sec. 596) states:

" . . . The courts never have held that in order to entitle one to locate a mining claim upon the public domain he shall show a paying mine at the time of location. . . ."

(*Cascaden v. Bartolis*, *supra*; *Madison v. Octave Oil Co.*, 154 Cal. 768, 99 Pac. 176.) Ricketts quotes from *Book v. Justice Co.*, *supra*, as follows:

"Logically carried out it would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode or lode of quartz

or other rock in place bearing gold or silver which he had discovered, would pay all of the expenses of removing, extracting, crushing and reducing the ore and leaving a profit to the owner. If this view should be sustained, it is manifest it would lead to absurd, injurious and unjust results."

In any event, this action being by the rival location claimants, unless the issue of discovery is specifically raised at the trial, the appellants have no right to press this issue.

Even were the issue properly before the Court on this appeal, which we assert it is not, as we have theretofore pointed out, there was ample evidence to show that there was discovery of mineral before the locations were filed.

Point III of Appellants Hammond, et al.

Under this argument, appellants Hammond present two contentions, the first being that appellees failed to comply with the provisions of Section 2303a of the Public Resources Code of California, requiring the location of placer claims to be made by posting a Notice of Location upon a tree, rock in place, stone, post or monument. They say that plaintiffs cannot take advantage of the posts driven by appellees upon the lands on September 6, 1945, when the lands were not yet open to entry.

The complete answer to this contention may be found in Lindley on Mines, Vol. 2, Sec. 408, page 953, as follows:

"A relocater may adopt stakes and monuments of a former location if they are still on the ground, in the absence of a statute specially authorizing it, provided the law in force in the state does not require new marking, as it does in some states."

California does not require new marking. The case of *Concealy v. Hart*, 129 Cal. 480, 62 Pac. 44, 45, states:

"The only contention of defendant on this point is, however, that the location of plaintiffs does not comply with the provision of the first sentence of said section 2324, to the effect that 'the location must be distinctly marked on the ground so that its boundaries can be readily traced'; and the objection made by the defendant in this matter is that the plaintiffs in making this location *did not put in new stakes to mark the boundaries, but referred to and used stakes which were standing on the ground, and which had been put in by them on a former occasion.* . . . This contention is not maintainable. These stakes so distinctly marked the location on the ground that its boundaries could be readily traced, and this was all that the statute requires. As the stakes referred to already stood at the proper places, it would have been a useless work to have taken them out and put them in again, or to have replaced them with other stakes. . . ."

But appellants say that the placing of the notices in a glass bottle (a seven or eight inch mason jar), which was buried (to a depth of four or five inches) in the ground, and which would have been visible above the ground at the foot of the posts [see photographs, appellees' Exhibit 43, R. 148], fails to give the publicity or information contemplated by the Code section. Placing such a notice in such fashion, below a post marking the ground and claim securely driven into the ground, is in accord with good mining practice, and is exactly what neither group of appellants did do. (*United States v. Sherman*, 1923, 8 Cir., 288 Fed. 497; *Alaska Consolidated Oil Fields v. Itane*, 1932, 9 Cir., 54 F. (2d) 868, 870-

871.) Ricketts states that the location notices should be posted at the discovery point *and it is customary to protect it from the elements in a box, tin can or cairn in plain view.* (Manner of Locating and Holding Mineral Claims in California, 1946, by A. H. Ricketts, with revisions as of July, 1946, by C. H. Logan.) And in Ricketts, American Mining Law, 1943, Sec. 695, it is likewise stated:

“It is manifest that some precaution must be taken by a locator to protect his posted notice of location from destruction by the elements. This some locators seek to do, by covering such notice with glass, or folding it in a box and placing the box in a conspicuous place, or putting the notice upon a mound of rock, or putting the notice within a tin can.”

To the same effect, see Lindley on Mines, Vol. 2, Sec. 356, page 821.

Surely, tacking the notice upon a stake and leaving it exposed to the elements in a windy desert (to which counsel for appellants Hammond called attention at the trial [R. 383]) as the Hammond group did, or just putting an incomplete notice (with no legal description, as permitted by Section 2303(b) Public Resources Code of California and no reference to some natural object or permanent monument, as prescribed by the same section, subdivision (a) thereof, the original being recorded and thereafter, with the legal description, being re-recorded [R. 308-309]) in a tin can some place on the claim with no post, monument or marker, as the Jose group did [R. 308-317], is not a compliance with the requirement that the claim be marked by post, and the same protected in some manner from the elements.

Appellants' next contention under Point III is that appellees did not comply with the provisions of Section 2305 of the Public Resources Code requiring performance of at least one dollar's worth of work for each acre included within the claims.

Mr. Lewis testified without any objection from any of the appellants that he, in behalf of appellees, had expended in excess of \$160.00 for each claim, and had expended a total of \$2,600.00 on all the claims. It will be observed that this did not include anything for Mr. Lewis' time and effort or expenses (see time book). The bankers corroborated the expenditure of \$2,500.00 for labor, and the witness Wayne Hodgson, called to the stand by the appellants Jose, *et al.*, as their witness, testified that he witnessed other payments by Mr. Lewis by the Safeway Store and that he assisted therein [R. 369-370]. He also paid certain laborers funds supplied by Mr. Lewis [R. 206]. It would seem, therefore, that appellees did expend in excess of the sum of \$160.00, as the uncontradicted and unobjected evidence of Mr. Lewis disclosed.

As to the argument of appellants Hammond, *et al.*, that appellees did not establish at the trial the manner of apportionment of the expenditures among the respective sixteen claims, and that therefore, they failed to meet the requirements of the section, it would be manifestly unfair for the appellants to raise that issue now in this Court for the first time, since they permitted appellees to prove their case at the trial, without objection, by direct questions to Mr. Lewis on the subject, when—if a seasonable objection had been interposed, appellees herein could have met it and have overcome it.

However that may be, there is ample evidence that the proper amount of work was done upon each claim, that

the reasonable value of the labor in performance thereof was paid—that it was done with pick and shovel in the accepted practice of good mining. The amount expended therefor, and the reasonable value thereof, was not objected to when testified to by Mr. Lewis. The record is ample to substantiate the amount which appellees claimed to have expended; and, as is stated in Lindley on Mines, Vol. 2, Sec. 635, page 1579:

“Cost is an element in establishing value, and while not conclusive, strongly tends to establish the good faith of the claimant.”

In the same section, it is also said (pp. 1579-1580):

“In estimating the value of the labor performed the jury should consider the distance of the mine from the nearest point where labor could be procured, the cost of maintaining men while labor was being performed, the current rate of wages, and any other necessary and reasonable expense which might be incurred in the performance of the said labor.”

Mr. William E. Wilson, a mining engineer, and a witness for the appellants, stated that the removal of dirt by hand labor in this area would run about \$3.00 per yard [R. 345-346]. In some instances the clay was extremely hard and in other instances it was not [R. 138]. It follows logically that the harder the ground, the less one man could move in a day, which accounts for the fact that less yardage was removed from some claims than others. Notwithstanding this fact, over 1,436 cubic yards of material was removed by hand labor by appellees from the 16 claims, which—calculated at the value placed thereon by appellants’ witness, Mr. William E. Wilson—means

that over \$4,308.00 worth of material was removed by appellees from the 16 claims.

But, not only did Mr. Lewis testify that he expended over \$160.00 per claim, he explained how he did so. They kept crews of 10 men each and would work them two 8-hour days on each claim, paying them \$1.00 per hour. It is only a matter of calculation to find that the amount expended by appellees was a minimum of \$160.00 per claim.

Point IV.

Under this proposition, appellants Hammond first argue that they fully complied with the provisions of the Public Resources Code of California pertaining to the posting of notices of location. On page 30 of their brief, in the fine print, appellants Hammond attempt to explain why the trial court erred in its opinion that the Amended Notices of Location were not true and correct copies of the cardboard notices (being Colorado forms), since the said Amended Notices contained the statement of the markings and statement of performance of the discovery work, which was not on the cardboard notices. They quote a part of Section 2313 of the Public Resources Code, omitting the part hereinafter referred to in italics, which says that "a true copy of the Notice of Location, together with a statement of the markings of the boundaries as required, *in this chapter*, and of the performance . . ." be recorded. Section 2303, which requires such markings, is in that chapter.

The so-called Amended Notices of Location were not at all duplicates of the Notices posted on the property, excepting only the addition of the discovery work done, as appellants Hammond would have this Court believe.

The card notices of location contained no "Statement of Markings and Boundaries" whatever. The Amended Notices contained such provision, under which this statement appears:

"The markings of the boundaries of the aforesaid claim have been dispensed with since the claim has been located and described by legal subdivisions conforming to the United States General Land Office Survey of 1912."

The foregoing appears nowhere on the notice actually posted on the property, nor upon the duplicate recorded September 7, 1945. Can it be said that this Amended Notice is a "substantially true copy," as appellants contend?

We do not think that appellants Hammond, *et al.*, can present any case so romantic as to hold that such an amendment to the Notice of Location as was made in this case would be an inconsequential amendment. The cases to which they referred on page 31 of their brief are cases involving errors such as immaterial errors in the legal description, cured by references to monuments, etc. We are certain they can present no case going to the extent of holding that the purported Amended Notice of Location in this case contained an immaterial amendment.

The case of *Swanson v. Sears*, 224 U. S. 180, 181 (32 S. Ct. 455), relied upon by appellants Hammond, is authority against them, its effect being that after property has been properly located, etc., it is withdrawn from entry by others. This makes the claims of both Hammond's group and the Joses' group void, for the Houck group had already properly located the property, had previously discovered mineral thereon, and were in the con-

structive possession thereof. Ricketts (American Mining Law, Sec. 760) states:

“In practice, discovery usually precedes location. The mining act treats it as the initial step, but *in the absence of an intervening right* it is no objection that the usual and statutory order is reversed. In such case, the location becomes effective from the date of discovery, *but in the presence of an intervening right it must remain of no effect.*”

Appellants knew of the claims of appellees before they proceeded to do their so-called discovery work and should not now be permitted to assert their claim to *prior discovery of mineral* by having been prior in doing *discovery work*. Their confusion in terms, and their failure to distinguish between the discovery of minerals and discovery work, pointed out earlier in this brief, is responsible for the contention now presented, that they made “discovery” first.

In any event, we again call attention to the language of *Chrisman v. Miller, supra*, in complete answer to appellants claim here—there being no issue of discovery in this case by way of pleading or evidence.

Point V.

Under this point, appellants urge the Court to reverse the judgment and instruct the trial court to enter judgment in their favor. To our way of thinking, the whole point is a sham argument, presented for the sole purpose of bolstering a weak and untenable position, and we intend to waste no time in answering it.

The Jose Brief.

A great deal that has been said is already in answer to the brief filed by the Jose group; for example, in their argument under Specification of Error No. 1, the Jose group states at least twice, that there was no evidence that appellees ever made any discovery until in December of 1945. We feel that we have completely answered this argument. On page 12 of the Jose brief, they argue that the Hammond group did not perform at least \$1.00 worth of work for each acre included in the claim. With this argument, we are in accord.

At this point, we wish to again call attention to the case of *Swanson v. Sears, supra*, holding that after property has been properly located, it is withdrawn from entry by others. The Jose group were charged with knowledge in January, 1946, that on September 7, 1945, with claims properly posted and visible to the naked eye and discovery work upon the property also visible to the naked eye, that other parties were in possession of the property, and they are certainly in no position to assert the validity of their claims, even if they had been properly filed.

As to the manner of filing, we call attention to the testimony of William F. Lancaster, called by the Jose group, as follows:

“Q. Now, directing your attention to a document that has reference to the Northeast Quarter of Section 20, Township 14 South, Range 12 East, was there a duplicate [315] document of that made?

A. Yes, there was.

Q. And on what date was that, Mr. Lancaster?

A. That was made on January 17th.

Q. And what was done with the duplicate document? A. *The duplicate document was placed into*

the ground in a can on the northeast Quarter of Section 20.

Q. And who placed it there? A. Let me see, Mr. John A. Jose. . . .

Q. Now, what was done with the documents that you have in your hand?

The Court: What is the date of that document?

Mr. Wood: *17th of January, 1946.*

The Witness: Well, this document—I filed this document with the County Recorder on the same day at 4:30 p. m. [316]

Q. Now, after you got it back from the County Recorder did you do anything further with the document? A. Yes. After we completed our location work on the property, I refiled this document with the County Recorder on April 12th, 1946.

Q. Now, did you add anything to the document prior to the refileing of it? A. Yes. I myself filled in the statement on the back of it, marking the boundaries, which read:

‘The Southeast Quarter of Section 20, Township 14 South, Range 12 East. S.B.B. & M.’

And then in the statement of discovery work performed, I filled in the following:

‘By performing at least \$1.00 worth of work for each acre included in said claim, removing a minimum of 600 cubic yards of material to discovery of Montmorillonite on said claim, and sinking a shaft and open cut to a depth of at least ten feet from the lowest part of the rim at the surface.’

And then I signed my name as for the rest of the owners.

Q. And after you had done that you had it re-recorded? A. That is right, on April 12th, 1946.”
[R. 308-309.]

This is the method used by the appellants Jose throughout the rest of the entire claims [R. 313, 321]. Surely this does not comply with the law providing for the proper method of locating claims.

As to Specifications of Error, Nos. 2 and 3, the Jose group contends that appellees did not perform at least \$1.00 worth of work per acre on each claim. This, we think, we have fully answered in our preceding discussion.

As to Specifications of Error, Nos. 4 and 5, we think the evidence does support the conclusion reached by the Court, but even if it does not, the errors charged are upon immaterial matters.

As to Specification of Error No. 6, we think we have fully discussed this in our brief.

Conclusion.

The appellees' group, in each instance, went upon the claim, posted a Notice of Location and placed a copy of the location in a Mason jar at the foot of a post which delineated the claim by legal description and gave the name thereof. Thereafter, appellees' group fully complied with Sections 2303 and 2304 of the Public Resources Code of California and with Sections 35 and 36 of Title 30, U. S. C. A., doing the necessary development work thereon, preparing certificate to that effect, and causing a duplicate of the claim that had been placed upon each parcel of land as aforesaid, with a statement of the development work performed, to be recorded with the County Recorder of the county where the land is located.

As to the posting, the boundaries were clearly marked and the duplicate copies of the Location Notice placed in jars near the post where they could not be destroyed by the elements. In each instance the posting of the Notices

was witnessed by two witnesses, each of whom indicated to the minute the time of the posting.

As to the Hammond group, they came upon the property with Colorado forms of claims, not containing a statement of the markings and boundaries of the property, tacked upon stakes which they drove into the ground or erected monuments around the base thereof to hold them in place. They did not place duplicate copies of the claim in any tin can or jar or take any means or any step whatever to protect the same from the elements or to keep them from being blown away.

As to the Jose group, they did not place any posts upon the land at all, or stakes of any kind, but simply placed duplicate copies of their claim to each section in tin cans which were buried on the property. They did not mark the cans with stakes or posts or monuments of any kind.

The Hammond group caused their Colorado claims, duplicates of the ones posted upon the various claims, to be recorded at 10:00 a. m. on September 7, 1945. Said claims did not contain any statement of the development work done, (as they could not have on that occasion, the hour of 10:00 a. m., September 7, 1945, being the first minute at which the property could have been claimed by locators upon the land).

As to the development work, appellees herein excavated more than 7 cubic yards of dirt from each claim and expended more than \$1.00 per acre in so doing. Proof of this fact was established by the testimony of H. W. Lewis who testified in each instance as to each claim that he had expended more than \$160.00 for each claim and his testimony in that regard was corroborated by the time book of employees, which was kept, and by the

representatives from the bank who witnessed the payments, and by the testimony of Mr. Lewis as to the manner of performing said labor.

What appellants Hammond did on the property at the time of location is already set out in this brief. But attention should also be directed to the fact that the sense of precaution of the Hammond group did not extend to the procurement of proper California forms, and said Colorado forms bore no evidence of ever having been signed when examined through a magnifying glass, although the typing thereon was not entirely deleted, even though weatherbeaten [R. 254]. They recorded copies of the Location Notices at 10:00 a. m. on September 7, 1945, to-wit, the same day the originals were placed on the land, but all, with the exception of Platte No. 3, to-wit, the Southeast Quarter (SE $\frac{1}{4}$) of Section 21, were recorded prior to the time that they were posted. Ricketts (American Mining Law, Sec. 698) states: "*In the absence of any intervening right* the recording of a Notice of Location before it is posted upon the ground will not vitiate the location." (See *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182; *Con. Mutual Oil Co. v. United States*, 245 Fed. 524.)

Here, there were intervening rights.

The originals of these location notices were never re-recorded, nor were they introduced at the trial as the proper notice of location, counsel for the Hammond group emphasizing the purpose of their introduction, as follows:

"Mr. Painter: I just got through saying, your Honor, *I was not asking them to be introduced in evidence for the purpose of showing that we complied with any statute, other than that we have in*

evidence a duplicate of that which was posted on the property for which we have the oral testimony of the witnesses.” [R. 349.]

They then relied upon Amended Notices of Location, which were recorded November 24, 1945, to-wit, after all rights of appellees herein had accrued [R. 352-355].

Appellants Hammond, *et al.*, presented no evidence whatever of discovery of mineral *before* location, as did the appellees [R. 143]. As we have heretofore set out, appellees were on the property in 1942, took samples and had the same analyzed and found it to contain Montmorillonite clay. No objection whatever to the statement of Mr. Lewis that he had it analyzed and was told it was Montmorillonite, was interposed by either of appellants at the trial [R. 143].

There is not a word in the transcript that indicates the discovery of *Montmorillonite* clay by appellants. They refer in their brief to the uncovering of “clay,” referring to pages 338, 340 and 341 of the record, to substantiate their claim to the first discovery of “mineral.” We realize that clay is a mineral, but the value in this property is that it is a valuable type of mineral, to-wit, Montmorillonite. So far as the record discloses, appellants never discovered the true value thereof.

We submit that the judgment reached by the trial court in this matter is a just and logical conclusion from the evidence presented; that complete and entire justice in the matter has been done and that the judgment should be affirmed in its entirety.

Respectfully submitted,

ORRIS R. HEDGES,

MONTA W. SHIRLEY,

Attorneys for Appellees.

No. 11749.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER, JOHN S. PATTEN, HARRIS H. HAMMOND, A. L. BERGERE, J. C. BÉRGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administrator of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA M. SHEPARD, HATTIE M. HOUCK, RUTH M. HEBBERD, MINNIE N. MCKENZIE, HOWARD H. MCKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

Brief of Appellants Harris H. Hammond, A. L. Ber-
gere, J. C. Bergere, Willard Wallace, Edna M.
Wallace, James P. Delaney, Mary J. Delaney and
Irvin S. Barthel.

REYNOLDS, PAINTER & CHERNISS,
1111 Citizens National Bank Building, Los Angeles 13,
Attorneys for Appellants.

TOPICAL INDEX

	PAGE
Statement of pleadings and facts disclosing jurisdiction.....	2
Statement of the case.....	3
Specification of errors.....	8
I.	
In a suit to quiet title to a mining claim the plaintiff must establish his own title, failing in which he cannot recover because of any alleged weakness in the defendants' title.....	16
II.	
Title to and possession of a mining claim cannot be sustained unless the claimant establishes a discovery by him of minerals....	18
III.	
The acts and proceedings taken by appellees for the location of their respective claims were defective and insufficient to establish a title or right thereto.....	24
IV.	
The acts and proceedings taken by the appellants clearly establish their right and title to the lands described in their mining claims	29
V.	
In an equity case where the findings of fact are against the uncontradicted evidence, and the conclusions of law and decree are thereby erroneous, the Circuit Court will direct the lower court to render the proper judgment.....	38
Conclusion	39

TABLE OF AUTHORITIES CITED

CASES	PAGE
Becker v. Long, 196 Fed. 721.....	33
Belk v. Meagher, 104 U. S. 279.....	17, 35
Cameron v. United States, 252 U. S. 450, 40 S. Ct. 410.....	21
Charlton v. Kelly, 156 Fed. 433.....	21, 23
Chrisman v. Miller, 197 U. S. 313, 25 S. Ct. 468.....	22
Cole v. Ralph, 252 U. S. 286, 40 S. Ct. 321.....	18, 19, 36
Denman v. Smith, 14 Cal. (2d) 752, 97 P. (2d) 451.....	17
Erhardt v. Boaro, 113 U. S. 527, 5 S. Ct. 560.....	34
Garibaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425.....	22
Green v. Gavin, 11 Cal. App. 506, 105 Pac. 761.....	31
Gwillim v. Donnellan, 115 U. S. 45, 5 S. Ct. 1110.....	16
Hall v. McKinnon, 193 Fed. 572.....	20, 33
Hooper v. First Exchange Nat. Bank of Coeur D'Alene, 53 F. (2d) 593	38
Hopper v. Elliott, 8 Cal. (2d) 734, 68 P. (2d) 235.....	22
Iron Silver Mining Co. v. Reynolds, 124 U. S. 374, 8 S. Ct. 598	22
Johanson v. White, 160 Fed. 901.....	36
Keller v. Potomac Electric Co., 261 U. S. 428, 43 S. Ct. 445.....	38
Kramer v. Gladding, McBean & Co., 30 Cal. App. (2d) 98, 85 P. (2d) 552.....	21
MacGowan v. Barber, 127 F. (2d) 458.....	38
McCleary v. Braddus, 14 Cal. App. 60, 111 Pac. 125.....	37
McCulloch v. Murphy, et al., 125 Fed. 147.....	29
McKay, et al. v. Nevesler, 148 Fed. 86.....	29
Mitchell v. Hutchinson, 142 Cal. 404, 76 Pac. 55.....	31
Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673.....	23
New England Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180....	37
Oregon King Mining Co. v. Brown, 119 Fed. 48.....	31
Standard Shales Products Company, 52 L. D. 522.....	29

	PAGE
Steele v. Tanana Mines R. Co., 148 Fed. 678.....	20
Stolp, et al. v. Treasury Gold Mining Co., 38 Wash. 619, 80 Pac. 817	28
Sullivan v. Iron Silver Mining Co., 143 U. S. 431, 12 S. Ct. 555	22
Swanson v. Sears, 224 U. S. 180, 32 S. Ct. 455.....	33
Tuolumne Consolidated Mining Company v. Maier, 134 Cal. 583, 66 Pac. 863.....	20
Union Central Life Insurance Co. v. Imsland, 91 F. (2d) 365....	38
United States v. McCutchen, 234 Fed. 702.....	26
United States v. McCutcheon, 238 Fed. 575.....	19
United States v. Midwest Oil Co., 236 U. S. 459, 35 S. Ct. 309	26
United States v. Mitchell, 104 F. (2d) 343.....	38
Whalen Consolidated Copper Mining Co. v. Whalen, et al., 127 Fed. 611	29

STATUTES

California Public Resources Code, Sec. 2303.....	9, 10, 11
California Public Resources Code, Sec. 2303a.....	24, 25
California Public Resources Code, Sec. 2304	11, 31
California Public Resources Code, Sec. 2305.....	10, 11, 24, 26, 31
California Public Resources Code, Sec. 2307.....	27
California Public Resources Code, Sec. 2313.....	30
Judicial Code, Sec. 24 (28 U. S. C. A. (41)).....	2
Judicial Code, Sec. 128 (28 U. S. C. A. (225)).....	2
Judicial Code, Sec. 238 (28 U. S. C. A. (345)).....	2
Pickett Act, 36 Stat. 847 (43 U. S. C. A. (41)).....	25
United States Revised Statutes 2320 (30 U. S. C. A. (23)).....	19
United States Revised Statutes 2329 (30 U. S. C. A. (35)).....	19
United States Revised Statutes 2331 (30 U. S. C. A. (35)).....	19

TEXTBOOKS	PAGE
40 Corpus Juris, Sec. 177, pp. 784-785.....	21
2 Lindley on Mines, Sec. 419A, p. 986.....	26
Ricketts, American Mining Law, Sec. 484.....	27

INDEX TO APPENDIX

	PAGE
Order of Abe Fortas, Acting Secretary of the Interior, revoking in part Executive Order 8865 and opening lands under appli- cable laws	1
California Public Resources Code, Sec. 2303.....	2
California Public Resources Code, Section 2304.....	3
California Public Resources Code, Section 2305.....	3
California Public Resources Code, Section 2313.....	4

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Appellants,

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Appellees.

Brief of Appellants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel.

This is an appeal from a final decree of the District Court of the Southern District of California, Central Division, quieting title in a suit brought by the Appellees against Appellants to quiet title to sixteen placer mining claims located in Imperial County, State of California.

Three sets of claimants are involved in this cause—the Appellees, the Appellants HARRIS H. HAMMON, A. L.

BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL, and the Appellants J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER and JOHN S. PATTEN (for convenience the last named Appellants will be referred to as the JOSE GROUP).

Statement of Pleadings and Facts Disclosing Jurisdiction.

(1) The statutory provisions sustaining the jurisdiction of the District Court of the United States are found in Judicial Code of the United States, Section 24, amended (28 U. S. C. A. (41)). Jurisdiction of this Court is based upon Judicial Code Section 128, amended (28 U. S. C. A. (225)); Judicial Code, Section 238 (28 U. S. C. A. (345)).

(2) In their action to quiet title to the placer mining claims described in the Complaint, Appellees alleged that the jurisdiction of the District Court is founded on diversity of citizenship, existence of a Federal question and the amount in controversy [R. 1-3]. These allegations were admitted by the Answer of Appellees [R. 19] and stipulated to in the course of the trial [R. 63-64.]

The Complaint is in the usual form to quiet title. Appellees prayed for a judgment adjudging the property to be declared to be theirs, free and clear of any claims, and for an injunction against interference by Appellants with the possession of said lands [R. 6-9]. By their Answer Appellants denied the material allegations of the Complaint. Appellants alleged that they were the owners of the lands described therein, that the value thereof was in

excess of \$100,000.00, and that their occupancy was rightful [R. 21].

By way of counter-claim against Appellees to quiet title, Appellants alleged that jurisdiction was based upon diversity of citizenship, the existence of a Federal question and the amount in controversy [R. 22-23]. Appellants alleged that they were the owners of the premises described by designated placer mining claims therein [R. 23] and sought a decree quieting Appellants' title thereto. The allegations of Appellants' counter-claim were repeated and made the basis of relief sought by way of cross-claim against the Jose Group [R. 26-29] who in their Answer denied the material allegations thereof and prayed to have their alleged title to the lands quieted as against Appellants [R. 31].

Statement of the Case.

This suit arises out of conflicting claims of Appellees and Appellants based upon their sixteen respective placer mining claims to certain land in Imperial County, State of California, in Sections 20, 21, 28 and 29, Township 14 South, Range 12 East, San Bernardino Base and Meridian. Appellees, Appellants and the Jose Group each assert title to sixteen identical 160 acre placer claims as association claims in the sections of land hereinbefore referred to.

The land contains deposits of montmorillonite, which is a mineral of a clay-like composition and has value as a food supplement for poultry, cattle and agricultural products. On October 19th, 1920, these lands were, by order of the Secretary of the Department of Interior, pursuant to an Act of Congress, withdrawn from entry [R. 236]; and by Executive order, dated August 21st 1941, the lands were further withdrawn for the use of the War

Department for combat firing [R. 239; Pltf. Ex. 48]. These orders remained in effect until July 6th, 1945, at which time the Acting Secretary of the Interior revoked the 1920 order of withdrawal and the 1941 Executive order for combat firing ranges affecting the land, and issued an order for the reopening of the lands, which provided as follows:

“This order shall not otherwise become effective to change the status of the lands until 10 A. M. on the 63rd day from the date on which it is signed, at which time the lands . . . shall become subject . . . to location, entry and patent, under the general mining laws . . .” [Pltf. Ex. 47.]

Under the provisions of this order, the lands were not open for entry until September 7th, 1945, at 10:00 o'clock, A. M.*

On September 6th, 1945, Appellees and Appellants both went upon the lands. Appellants' activities consisted solely in ascertaining the locations of the Government monuments or stakes designating the section corners and quarter corners [R. 267-269]. Appellees likewise explored the lands for the purpose of locating the Government survey stakes [R. 116]. But in addition, Appellees on this 6th day of September, which was one day before the date when the lands were legally open for entry, proceeded to do the following:

In each quarter section of the four sections they drove a board about four inches wide and four feet long into the ground. Each board had painted upon it the name of the claim and its legal description [R. 118-119]. Beneath the ground near the board in each case a hole was dug, into which was placed a Mason jar containing a duplicate

*Appendix pp. 1 and 2.

of a Notice of Location, the original of which was subsequently recorded in the Office of the County Recorder of Imperial County [R. 68]. The last location notice was completed at 6:45 o'clock, P. M. on the 6th of September [R. 168]. In this manner sixteen such boards and notices were placed upon the various quarter sections involved.

On the following day, September 7th, 1945, both Appellants and Appellees again entered upon the lands. Appellees had prepared additional Notices of Location of the respective claims. Each such notice was dated September 7th and was executed by the locators. The activities of Appellees consisted solely of going from location to location and placing in each of the sixteen Mason jars which were in the ground, a notice of location dated September 7th, and leaving it with the notice placed in the jar on the previous day, September 6th [R. 126-127, 199-203].

Appellants located their claims upon the land as follows:

Sixteen Notices of Location in and to the lands had been prepared by them upon cardboards containing the name of the claim, names of the locators, date of location, acreage claimed and the legal description of the claim [R. 250]. Sixteen paper instruments, which were duplicates of the cardboard Notices, likewise had been prepared [R. 251]. All of these 32 instruments, both cardboard and paper, were signed by the Appellants [R. 251, 255-257]. The cardboard Notices were each tacked upon a board nailed to a stake approximately five feet long [R. 258]. On each of the sixteen quarter sections the Appellants drove a stake containing the respective cardboard Notice of Location relating thereto, identified by the name of the claim and its legal description.

Each stake was driven into the earth to the extent of one foot [R. 270, 272, 278, 283].

All of this work of staking was completed by Appellants between 10:00 o'clock in the morning and 2:15 in the afternoon of September 7th [R. 269, 292], and on September 7th at 10 A. M. true copies of the cardboard notices of location were recorded in the Office of the County Recorder of Imperial County, California [R. 259].

Nothing further was done on the land after the 7th day of September by either the Appellees or the Appellants until the 4th day of November, 1945, at which time a mining engineer, employed by Appellants, laid out upon the lands, locations for the excavation of trenches, pits and open cuts [R. 326-333]. Under the direction and supervision of the mining engineer, earth-moving equipment was engaged and utilized in excavating the open cuts for a period of five consecutive days up to the 12th day of November, 1945 [R. 326-327, 328, 333-334].

Each parcel of land described in each of Appellant's sixteen Notices of Location was thus excavated with open cuts. At least two hundred cubic yards of excavated material were removed from each of the parcels of land described in the sixteen claims [R. 338-340]. These earth-moving operations were worth \$1.50 a cubic yard [R. 342].

It was during the progress of this excavation work that discovery was made by Appellants of the existence of Montmorrillonite [R. 338, 340, 341].

Subsequently, on November 24th, 1945, following the completion of their discovery work above set forth, and within ninety days of their postings of September 7th, Appellants recorded sixteen Notices of Location of their Placer Claims in the Office of the County Recorder of Imperial County. These Notices were entitled "Amended

Notice of Location of Placer Claim.” In all respects, however, they were true copies of the original cardboard Notices posted upon the land in September. Each Notice contained the name of the claim, names of the locators, the date of location, the acreage claimed, to wit: 160 acres, the legal description of the property embraced within the claim and a statement of the performance of the discovery work. These Notices were signed by all of the Appellants [R. 353-354, Deft. Ex. KK].

Turning to the Appellees, the period following September 7th and until the last of November, 1945, is characterized by a complete lack of activity. They did not remain in possession of the claims. Except for occasional visits to the land in October and November, 1945, to inspect their Notices, Appellees did no work of any kind thereon until the last week in November [R. 133-134]. This was approximately ten days after Appellants had completed the performance of their discovery work and had discovered mineral. Appellees reentered the lands in the last week of November, 1945. They then excavated pits on the sixteen quarter sections [R. 136-142], in accordance with locations laid out upon the land by Appellees’ engineer prior to September 7th, 1945 [R. 66, 67, 68, 135]. Montmorrillonite was not discovered in either the first or second locations dug by the Appellees [R. 136, 137]. With reference to the remaining fourteen locations, the record contains nothing as to the discovery of the mineral. Appellees spent \$2402.00 in connection with this work of which \$2085.90 was expended for labor, and the balance for other items [Pltf. Ex. 45, R. 153].

Subsequent to the excavation work above set forth, and on December 4th, 1945, Appellees recorded copies of their Notices of Location dated September 6th; and on December 5th they recorded copies of their Notices dated

September 7th. All copies thus recorded contained a statement of markings and a statement of discovery work performed. [Pltf. Exs. 6 to 21, incl.; Pltf. Exs. 22 to 37, incl.]

Specification of Errors.

(1) The Court erred in making its Finding of Fact No. V [R. 44-45], reading as follows:

"That it is true that on the 7th day of September, 1945, the plaintiffs were the owners and entitled to the possession of those certain lands and premises situated in the County of Imperial, State of California, known and described under the following Placer Mining Claims, all in Township 14 South, Range 12 East, San Bernardino Base and Meridian, and consisting of the numbers of acres, respectively, set opposite each name, to wit:

<i>Name</i>	<i>Description</i>	<i>Acreage</i>
Frigid No. 1	NW $\frac{1}{4}$ of Section 29	160
Frigid No. 2	NE $\frac{1}{4}$ of Section 29	160
Frigid No. 3	SW $\frac{1}{4}$ of Section 29	160
Frigid No. 4	SE $\frac{1}{4}$ of Section 29	160
Temperate No. 1	NW $\frac{1}{4}$ of Section 21	160
Temperate No. 2	NE $\frac{1}{4}$ of Section 21	160
Temperate No. 3	SW $\frac{1}{4}$ of Section 21	160
Temperate No. 4	SE $\frac{1}{4}$ of Section 21	160
Tropical No. 1	NW $\frac{1}{4}$ of Section 28	160
Tropical No. 2	NE $\frac{1}{4}$ of Section 28	160
Tropical No. 3	SW $\frac{1}{4}$ of Section 28	160
Tropical No. 4	SE $\frac{1}{4}$ of Section 28	160
Torrid No. 1	NW $\frac{1}{4}$ of Section 20	160
Torrid No. 2	NE $\frac{1}{4}$ of Section 20	160
Torrid No. 3	SW $\frac{1}{4}$ of Section 20	160
Torrid No. 4	SE $\frac{1}{4}$ of Section 20	160"

The foregoing Finding of Fact is specified as being erroneous for the reason that the evidence does not disclose that Appellees discovered Montmorrillonite prior to discovery by Appellants, and for the further reason that the evidence is insufficient to sustain the Findings of Fact hereinafter designated as being erroneous, and which are essential to the making of Finding No. V.

(2) The Court erred in making its Finding of Fact No. VII [R. 45], reading as follows:

“That it is true that the plaintiffs fully complied with Sections 2303 and 2304 of the Public Resources Code of California, and with Sections 35 and 36 of Title 30, U. S. C. A.”

The foregoing Finding of Fact is specified as being erroneous for the reason that there is no evidence that the Appellees posted Notices of Location on September 7th, 1945.*

(3) The Court erred in making its Finding of Fact No. VIII [R. 45-46], reading as follows:

“That it is true that the plaintiffs clearly marked the boundaries of said property with posts which indicated the Sections claimed, and that Notices of Location of Placer Claims were posted and placed in jars near the post where they could not be destroyed by the elements, all in accordance with good recognized mining practice.”

The foregoing Finding of Fact is specified as being erroneous for the reason that there is no evidence that the Appellees marked the property with posts on Septem-

*See Appendix, pp. 2 and 3, where the provisions of Section 2303, California Public Resources Code, are set out.

ber 7th, 1945, or that Notices of Location of Placer Claims were posted on September 7th, 1945.

(4) The Court erred in making its Finding of Fact No. IX [R. 46], reading as follows:

“That it is true that each notice so posted by plaintiffs contained a statement of the markings of the boundaries by reference to surveyed Sections, and that a duplicate copy of each notice was duly recorded, within ninety (90) days from date of posting, in the County Recorder’s Office of Imperial County, California.”

The foregoing Finding of Fact is specified as being erroneous for the reason that the evidence, as indicated under assignment of error No. 3 with reference to Finding No. VIII, is insufficient to sustain the finding that there was a posting on September 7th, 1945, of the Notices of Location.

(5) The Court erred in making its Finding of Fact No. X [R. 46], reading as follows:

“That it is true that plaintiffs performed the necessary discovery work upon each of said Claims within the time permitted by law.”

The foregoing Finding of Fact is specified as being erroneous for the reason that the evidence is insufficient to sustain the foregoing Finding in that it does not appear that Appellees performed at least \$1.00 worth of work for each acre included in their claims within ninety days after the date of location, as required by Section 2305 of the Public Resources Code of California.*

*The provisions of Section 2305 of the California Public Resources Code are found in the Appendix, pp. 3 and 4.

(6) The Court erred in making its Finding of Fact No. XXIV [R. 48], reading as follows:

“That all of the denials of defendants’ answers and all of the allegations and averments of said answers, and all the allegations and averments of defendants’ cross-claims, adverse to and inconsistent with these Findings, are untrue.”

The foregoing Finding of Fact is specified as being erroneous for the reason that the evidence shows that Appellants posted and recorded their Notices of Location as required by law, that they were prior in the discovery of the mineral, and that they complied with the provisions of Sections 2303, 2304* and 2305 of the Public Resources Code of California and the Acts of Congress relating to the perfection of mining claims.

(7) The Court erred in making its Conclusion of Law No. I [R. 48], reading as follows:

“That the plaintiffs are the owners and entitled to possession of those certain Mining Claims described in plaintiffs’ complaint.”

The foregoing Conclusion of Law is specified as being erroneous for the reason that this Conclusion of Law is not supported by the evidence as is hereinbefore indicated in Specifications of Error Nos. 1, 2, 3, 4, 5, and 6 herein.

*The provisions of Section 2305 are set forth in the Appendix p. 3.

(8) The Court erred in making its Conclusion of Law No. II [R. 49], reading as follows:

“That the plaintiffs are entitled to a judgment quieting their title to said Mining Claims against the defendants and cross-claimants.”

The foregoing Conclusion of Law is specified as being erroneous for the reason that this Conclusion of Law is not supported by the evidence as is hereinbefore indicated in Specifications of Error Nos. 1, 2, 3, 4, 5, and 6 herein.

(9) The Court erred in making its Conclusion of Law No. III [R. 49], reading as follows:

“That the defendants and cross-claimants are entitled to take nothing by reason of their said cross-claims and cross-complaint.”

The foregoing Conclusion of Law is specified as being erroneous for the reason that this Conclusion of Law is not supported by the evidence as is hereinbefore indicated in Specifications of Error Nos. 1, 2, 3, 4, 5, and 6 herein.

(10) The Court erred in making its Conclusion of Law No. IV [R. 49], reading as follows:

“That the plaintiffs are entitled to their costs of suit incurred herein.”

The foregoing Conclusion of Law is specified as being erroneous for the reason that this Conclusion of Law is not supported by the evidence as is hereinbefore indicated in the Specifications of Error Nos. 1, 2, 3, 4, 5, and 6 herein.

ARGUMENT OF THE CASE.

Summary of Argument:

I. IN A SUIT TO QUIET TITLE TO A MINING CLAIM GENERAL PRINCIPLES APPLICABLE TO QUIET TITLE ACTIONS PREVAIL, AND UNLESS A PLAINTIFF ESTABLISHES HIS OWN TITLE, HE CANNOT RECOVER BY REASON OF ANY ALLEGED WEAKNESSES IN THE DEFENDANT'S TITLE.

II. IN ORDER TO ESTABLISH TITLE TO A PLACER MINING CLAIM, A PLAINTIFF MUST PROVE (1) A DISCOVERY OF MINERAL BY HIM; AND (2) COMPLIANCE WITH STATE STATUTORY ENACTMENTS RELATING TO THE POSTING OF NOTICES OF LOCATION AND PERFORMANCE OF DISCOVERY WORK. The evidence in this cause is utterly insufficient to establish a discovery of mineral by the Appellees. There is no evidence that they made a discovery of mineral either before or after discovery was made by Appellants.

III. THE ACTS AND PROCEEDINGS TAKEN BY APPELLEES FOR THE LOCATION OF THEIR RESPECTIVE CLAIMS WERE DEFECTIVE AND INSUFFICIENT TO ESTABLISH A TITLE OR RIGHT THERETO. The evidence was totally insufficient to show compliance by Appellees with the provisions of the Public Resources Code of California relating to the posting of Notices of Location and the performance of the discovery work. The evidence affirmatively showed that Appellees did not post Notices of Location on the lands on September 7th, 1945. The posting which was done by them was accomplished on September 6th, 1945, at which time the lands were not open to appropriation by reason of the existence of an Executive Order withdrawing the lands from entry. The only acts

II.

Title to and Possession of a Mining Claim Cannot Be Sustained Unless the Claimant Establishes a Discovery by Him of Minerals.

There is a complete want and absence of evidence in this cause tending to show the Appellees discovered Montmorillonite in or upon the lands described in their respective claims. The recitals of discovery contained in the sixteen Notices of Location introduced in evidence by Appellees [Plaintiffs' Exhibits No. 22 to 37, inclusive] are mere self-serving declarations and not evidence of discovery.

Cole v. Ralph, 252 U. S. 286, 303 (40 S. Ct. 321).

The only evidence concerning discovery is found in the testimony of the Appellee Harold W. Lewis. Lewis stated that he was on the property in 1942 at which time he picked up some samples from the land upon an open-face cliff. By hearsay these samples were said to have been analyzed and to have contained Montmorillonite clay [R. 143]. Mr. Lewis' presence upon the land at that time was without right, since these lands had been withdrawn from entry and were assigned to the War Department for combat purposes [Pltf. Ex. 48, R. 239-240]. Furthermore, Mr. Lewis did not state from what particular portion of the land these samples were obtained, whether the same were in one or more quarter sections, nor the extent or amount of the clay in the samples. There is no testimony or evidence that a reasonable man would have been justified in expending money for the development of the land on the basis of the samples which Mr. Lewis obtained. Appellees did not discover clay upon the two sections they excavated in the last week of November, 1945; no evidence was offered by them regarding discovery in

any of the other fourteen claims which they excavated [R. 136, 137-145]. In evaluating this testimony in the light of the Court's Findings, we respectfully direct the Court's attention to the following principles of law relating to discovery:

(1) Discovery of minerals is an absolute prerequisite to the existence of a claimant's right or title to a placer mining claim. Revised Statute 2320 (30 U. S. C. A. (23)), provides as follows:

“ . . . no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.”

Revised Statutes 2329, 2331 (30 U. S. C. A. (35)), provides as follows:

“Claims usually called ‘placers,’ including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims;”

Cole v. Ralph, 252 U. S. 286, 295 (40 S. Ct. 321), states as follows:

“While the two kinds of location—lode and placer—differ in some respects, *a discovery within the limits of the claim is equally essential to both.*”

U. S. v. McCutcheon, 238 Fed. 575, 584, states as follows:

“It is hornbook law, of course, that *the successful location or appropriation of mineral lands of any sort, to be valid must be accompanied by a ‘discovery’* . . . In this behalf I can see no escape from the conclusion that, as against the Government, if the dependents had made such a location of, and ‘discovery’

upon, the land in question, as to invest them with a right of property therein, they had made such location and 'discovery' as to entitle them, as a matter of law and of right, to a patent. Conversely, if they had made no such 'discovery' as to entitle them to a patent as against the Government, they had made no such 'discovery' as to vest them with rights in and to the property."

In *Steele v. Tanana Mines R. Co.*, 148 Fed. 678, 679 (C. C. A. 9), the Court states:

"Although in some instances courts have questioned the necessity of an actual discovery of mineral upon gold placer ground, it is established by the decided weight of authority *that appropriate discovery is as necessary to the location of a placer claim as to the location of a lode claim.*"

To the same effect see:

Hall v. McKinnon, 193 Fed. 572, 576 (C. C. A. 9).

The foregoing is also the California law, as appears from the following statement in *Tuolumne Consolidated Mining Company v. Maier*, 134 Cal. 583, 585 (66 Pac. 863):

"We take it to be the conceded law that there can be no valid location of a mining claim without an actual mineral discovery thereon (*Erhardt v. Boaro*, 113 U. S. 535; *O'Reilly v. Campbell*, 116 U. S. 418);
. . . ."

(2) Discovery is the acquiring of knowledge that a placer claim contains minerals that are reasonably valuable for mining to an extent justifying a reasonably prudent man in expending time and money developing the claim

with the reasonable expectation of finding minerals in paying quantities.

40 C. J.—*Mining and Minerals*—Section 177, pages 784-785;

Cameron v. U. S., 252 U. S. 450, 459 (40 S. Ct. 410).

The foregoing rule was approved by this Court in *Charlton v. Kelly*, 156 Fed. 433 (C. C. A. 9), where it is stated as follows at page 436:

“And we held that, *to constitute a discovery* sufficient to support the location of a gold placer claim as against another mineral claimant, it is not necessary that gold must have been found thereon in paying quantities, but that *there must have been such a discovery of gold as to give reasonable evidence that the ground is valuable for placer mining*, taking into consideration its character, location and surroundings.”

The foregoing rule is also applied in California. In *Kramer v. Gladding, McBean & Co.*, 30 Cal. App. (2d) 98, 104 (85 P. (2d) 552), the Court states:

“‘The well established test is that to constitute a valid location there must be such a discovery of mineral as that an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and money thereon in the development of the property.’”

In this same connection it is established that a reasonable *belief* of the existence of mineral is not a substitute for *knowledge* of the existence, and a reasonable belief alone does not meet the test of discovery. This rule prevails both in the Federal cases and in California.

Iron Silver Mining Co. v. Reynolds, 124 U. S. 374, 383, 384 (8 S. Ct. 598); *Sullivan v. Iron Silver Mining Co.*, 143 U. S. 431, 441, 442 (12 S. Ct. 555); *Hopper v. Elliott*, 8 Cal. (2d) 734, 739 (68 P. (2d) 235).

A parallel case is found in *Garibaldi v. Grillo*, 17 Cal. App. 540 (120 Pac. 425), where a miner who was prospecting for gold, testified that he took out two pans of dirt from the land which he was told by other parties contained gold in paying quantities. In holding that the miner was not entitled to the ownership of the claim which he attempted to locate, the Court stated:

“‘Where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.’

Tested by these principles, we cannot say that the learned trial court was without warrant in holding that plaintiffs fell short, in their evidence, of meeting the statutory requirements as to a discovery of valuable minerals. It is only necessary to turn back and read the evidence of plaintiff Garibaldi to confirm the conclusion reached by the trial court.”

Furthermore, it is settled that mere surface indications do not constitute discovery. In *Chrisman v. Miller*, 197 U. S. 313, 321 (25 S. Ct. 468), it is stated:

“‘It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as “known” veins or lodes. To meet that designation the lodes or veins must be clearly ascertained,

and be of such extent as to render the land more valuable on that account, and justify their exploitation.’ ”

Accord: *Charlton v. Kelly*, 156 Fed. 433, 435 (C. C. A. 9); *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673 (C. C. Calif.). In the latter case the Court states at page 676 as follows:

“Mere indications of mineral, I repeat, do not constitute the discovery of the mineral itself. If so, a location made upon the discovery of such indications, followed by the proper marking of the boundaries of the claim and the doing of the statutory amount of work within the prescribed time, whether the work resulted in the actual discovery of mineral or not, would entitle the locator to apply for, and upon due proof and payment receive, the government title to the land as mineral land; which obviously would not only be unauthorized by any provision of the statute, but would be in direct conflict with the sections already cited.”

Applying the foregoing rules and principles to the evidence as disclosed by the Appellees’ case, it is apparent that there is an utter failure of proof upon the issue of discovery. The only evidence offered by the Appellees was the statement of Mr. Lewis that he found a few samples in 1942 which someone told him contained the clay. There is no testimony that he knew that the lands contained clay; there is no showing as to what particular portion of the claims these samples were taken from; there is no evidence that he was justified in expending any money or time upon the basis of what he had learned from a hearsay statement as to the character of the con-

tent of the samples; finally, the samples were taken from the side of a cliff and, obviously, even if they did contain clay, were mere surface indications, insufficient to establish that Montmorillonite existed upon the lands.

Since, therefore, discovery is an indispensable requirement to the establishment of a claim, it is evident that the Court erred in finding that the Plaintiffs were the owners and entitled to the possession of the mining claims described in their Complaint.

III.

The Acts and Proceedings Taken by Appellees for the Location of Their Respective Claims Were Defective and Insufficient to Establish a Title or Right Thereto.

In support of this statement, Appellants make two points:

(1) That Appellees failed to comply with the provisions of Section 2303a of the Public Resources Code of California requiring the location of placer claims to be made by posting a Notice of Location; and

(2) The provisions of Section 2305 of the Public Resources Code of California requiring at least one dollar's worth of work to be done within ninety days after the date of the location of any placer mining claim for each acre included in the claim.* Each of the foregoing points is hereinafter discussed.

*The provisions of these Sections of the Public Resources Code are quoted in full in the Appendix, pp. 2 to 4.

(1) Appellees failed to locate their respective placer claims by posting notices upon a tree, rock in place, stone, post or monument, as required by Section 2303a of the Public Resources Code of California. The evidence is undisputed that the only posts placed upon the respective claims of the Appellees were those placed thereon September 6th, 1945, when the lands were not yet open to entry [R. 118-126]. On September 7th, when Appellees again went upon the lands, they did not repost the property; they merely inserted in the glass jars an additional Notice of Location bearing the date September 7th [R. 126, 199-203]. These glass jars were buried in the ground to the depth of four or five inches.

The requirements of Section 2303(a) are specific. Posting must be upon a tree, rock in place, stone, post or monument. None of these conditions was complied with by the Appellees on September 7th. The placing of the Notices in a glass bottle, which was buried in the ground, obviously fails to give that publicity or information contemplated by the Code section.

On the other hand, to allow the Appellees to take advantage of their premature and unauthorized acts of driving the stakes on September 6th, would be to permit an inequity and to condone a violation of the Executive Orders for the withdrawal of the lands and the reopening Order of the Secretary of the Interior, dated July 6th, 1945.

It is provided in the *Pickett Act*, 36 Stat. 847 (43 U. S. C. A. (41)), that

“The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, . . . and such withdrawals or reservations shall

remain in force until revoked by him or by an Act of Congress."

A withdrawal of public lands by Executive Order operates as a severance thereof from the public domain. During the existence of the withdrawal, any act or proceeding taken for the initiation of a claim is void and cannot constitute the basis of any right. *U. S. v. Midwest Oil Co.*, 236 U. S. 459 (35 S. Ct. 309); *U. S. v. McCutchen*, 234 Fed. 702.

These principles are summarized in 2 *Lindley on Mines*, Section 419A, page 986, where the author states:

" . . . it is advisable in discussing the substances which are subject to location under the placer laws to invite attention to the fact that lands containing them may only be appropriated when found outside of withdrawal areas; in other words, such lands temporarily withdrawn are not 'public lands.' They remain in a state of reservation until freed by proclamation of the president or by an act of congress."

In view of these rules of law, it follows that the September 6th stakings on the part of Appellees were nullities and insufficient upon which to base any claim to the lands herein.

(2) The Appellees did not comply with the provisions of Section 2305 of the Public Resources Code requiring the performance of at least one dollar's worth of work for each acre included in their claims.

Under the provisions of the Public Resources Code of California, Section 2305, Appellees were required to perform "at least one dollar's worth of work for each acre included in the claim." Since the sixteen claims each contained 160 acres, Appellees were thereby required to

perform a total of \$2560.00 worth of work. Although Appellees testified that they expended in *excess* of \$160.00 for each claim [R. 138-142], and a total of \$2600.00, the affirmative evidence in their time book and records discloses that the aggregate amount involved as expended by them for labor was \$2085.90 [See Plaintiffs' Ex. 45]. In addition to labor, they paid \$150.00 for picks and shovels, \$5.00 for a steel tape, \$80.00 for gasoline, \$20.00 for canteens [R. 154-155], and \$62.00 for services rendered by the engineer in staking the property on September 6th [R. 153], making a total of \$317.00. These latter items do not constitute elements of labor or work; *Ricketts, American Mining Law*, Sec. 484; moreover, when this sum is added to the actual amount of \$2085.90 spent by Appellees, the statutory minimum of \$2560.00 is not met.

Moreover, and in view of the fact that Appellees introduced no competent evidence as to the manner in which the \$2085.90 was apportioned among their respective sixteen claims, the burden of proving compliance with the provisions of Section 2305 of the Public Resources Code of California, as to any particular claim, was not met by them. Since Appellees did not affirmatively prove compliance with Section 2305, whatever rights they had, if any, were rendered null and void under the provisions of Section 2307, Public Resources Code which are as follows:

“The failure or neglect of the locator or locators to comply with the requirements of sections . . . 2305 . . . of this code shall render the location null and void,”

Furthermore, in measuring Appellees' compliance with the provisions of Section 2305, it is well settled, that the

test with reference to the performance of the work is not the amount *spent* but the reasonable value thereof. On this point *McKirahan v. Gold King Mining Co.*, 39 S. Dak. 535, 165 N. W. 542, the Court states:

“To show that the work was not worth as much as it was found to be by the court, appellant introduced evidence showing the number of men that had been employed to do said work, the length of time they were engaged, the amount of wages received and the amount and cost of material, etc., that was used. By adopting this method of computing value, appellant showed that the work performed by the respondent did not amount to more than \$77.11 per claim for the year 1914. *But this is not the correct method of computing the value of assessment work on a mining claim. The true test is the actual value of the improvement to the mine. Evidence of the cost of labor, material, etc., is competent as tending to show the good faith of the party making the expenditure; but it is not conclusive upon the question of the value of such improvement.*”

To the same effect see *Stolp, et al. v. Treasury Gold Mining Co.*, 38 Wash. 619, 80 Pac. 817, where the Court states:

“No question is made as to the qualification of the witnesses to estimate the value of the work. One of them stated that the reasonable value of such work was \$9.00 per foot, and one of the witnesses said that the work was done in $7\frac{1}{2}$ days, by the three of them working together, and that the going wages for such work was \$5.00 per day per man. This witness also said that the miners' wages were \$3.50 per day. Appellant argues from this last statement that the value of the work done did not

amount to \$100.00. *The test for determining the value of the work done upon a mining claim is the reasonable value of the work, not what was paid for it or what the contract price was.* Lindley on Mines. While the rate of wages and the cost of the work are strong elements in establishing value, these elements are not conclusive of the value of the work done."

See, also to the same effect: *Standard Shales Products Company*, 52 L. D. 522; *McCulloch v. Murphy, et al.*, 125 Fed. 147; *Whalen Consolidated Copper Mining Co. v. Whalen, et al.*, 127 Fed. 611; *McKay, et al. v. Nevesler*, 148 Fed. 86.

IV.

The Acts and Proceedings Taken by the Appellants Clearly Established Their Right and Title to the Lands Described in Their Mining Claims.

(1) The Appellants fully complied with the provisions of the Public Resources Code of California pertaining to the posting of Notices of Location, the recordation of the same and the performance of discovery work; and (2) the Appellants made discovery of Montmorillonite. They were thereby prior in right to Appellees. Each of these points is hereinafter discussed:

(1) The Appellants fully complied with the provisions of the Public Resources Code of California pertaining to the posting of Notices of Location, the recordation of the same and the performance of discovery work.

As is hereinbefore indicated, see pages 5 and 6 of this brief, Appellants on September 7th, 1945, posted in each of the sixteen quarter sections a cardboard Notice of Location containing the name of the claim, names of

the locators, date of location, the acreage claimed, and the legal description of the property. These Notices were on five foot stakes, sunk into the earth to a depth of one foot, and were of a size which was conspicuous to all who desired information.

On November 24th, 1945, and well within the ninety-day statutory period prescribed by Section 2313 of the Public Resources Code of California, Appellants recorded in the Office of the County Recorder of Imperial County, State of California, true copies of these cardboard Notices so posted upon the property by them on September 7th [see Deft. Exs. KK]. While the Notices thus recorded were each entitled "Amended Notice," these Notices were true copies of the posted Notices for they contained the identical name of the claim, names of the locators, date of location, the acreage claimed, and the legal description of the property.*

*Defendants' Exhibits A to P, inclusive, although recorded on September 7th, 1945, were introduced and admitted for the sole purpose of having in evidence true copies of the cardboard Notices posted upon the property [R. 349]. By inspection of these two sets of exhibits [Defendants' Exs. A to P, inclusive, and KK], it will be seen that Defendants' Exhibits KK are true copies of Defendants' Exhibits A to P, inclusive, and hence, true copies of the original cardboard Notices posted on the property.

The Trial Court was of the opinion that the Amended Notice was not a true copy because it contained the statement of the markings and statement of performance of the discovery work, which were not contained on the cardboard Notices [R. 37]. This error is obvious for these additions are specifically required by Section 2313 of the Public Resources Code of California. To comply with the statute the locator must record a true copy of the original notice of location, together "*with a statement of the markings of the boundaries as required . . . and of the performance of the required discovery work in the office of the county recorder.*" within ninety days after posting the notice of location. Thus, the very language of the statute contemplates that the true copy to be recorded by a locator will contain matters not found in the original notice of location posted by him.

The fact that the Notices recorded on the 24th day of November were entitled "Amended Notice of Location of Placer Claim" does not make them any the less true copies of the original cardboard Notices posted upon the property for this Court has expressly held that a "true copy" provision of a statute is satisfied by recording a "substantially true copy," and that an "exact copy" is not required.

In *Oregon King Mining Co. v. Brown*, 119 Fed. 48 (C. C. A. 9), this Court laid down the following rule, at page 57 of the opinion:

" . . . it becomes necessary to decide but one other of the questions presented by the appeal; and that is whether or not it be necessary that the copy of the notice of location required by the Oregon statute to be recorded be a literal and exact copy of the notice posted. *We think it clear that it need only be a substantial copy.*"

This rule prevails in California, as appears in *Mitchell v. Hutchinson*, 142 Cal. 404, 410, 411 (76 Pac. 55), and *Green v. Gavin*, 11 Cal. App. 506, 509 (105 Pac. 761).

The foregoing authorities clearly sustain the proposition that the Amended Notices of Location, recorded on November 24th, 1945, were true copies of the cardboard Notices previously posted on the property by the Appellants. Compliance by Appellants with the recordation provision of Section 2313 of the Public Resources Code of California was therefore fully established.

Turning to the discovery work required to be performed by locators, the evidence is undisputed that Appellants fully complied with the provisions of Section 2304 and 2305 of the Public Resources Code of California. Between the 4th and 12th day of November, 1945, Appel-

lants excavated two hundred cubic yards of material from fourteen of their claims and two hundred fifteen cubic yards from the remaining two claims [R. 338-340]. The total cubic yardage thus removed was 3230 cubic yards. The reasonable value and worth of the work performed was at the rate of \$1.50 per cubic yard [R. 342], or a total of \$4845.00 for the work performed upon the entire sixteen claims. Each claim was thus far above the statutory minimum both as to cubage removed and value of work performed.

(2) The Appellants made discovery of Montmorillonite and were thereby prior in right to Appellees.

At pages 6 and 7 of this brief, it is pointed out that Appellants discovered mineral on the lands herein involved between November 4th and November 12th, 1945, and that at no time previous thereto did the Appellees make a discovery. In addition, it is shown that Appellees had not complied with the California statutes governing the posting of notices of location. Under such circumstances the superior right and title of Appellants attached on November 12th, 1945; they had previously posted their Notices of Location; and they had performed the required discovery work. The only remaining duty was that of recording copies of their Notices of Location together with a statement of the discovery work performed. This duty was discharged by them on November 24th, 1945, and within ninety days from the date of their original posting of Notice of Location in September. Having thus established their right and title to their respective claims,

no act upon the part of Appellees in entering upon the land or excavating the same would operate to deprive Appellants of their rights. As is stated in *Swanson v. Sears*, 224 U. S. 180, 181 (32 S. Ct. 455):

“A location and discovery on land withdrawn *quoad hoc* from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right. *Belk v. Meagher*, 104 U. S. 279. *Gwillim v. Donnellan*, 115 U. S. 45.”

This Court follows the rule that a subsequent attempted location of ground, upon which there is a prior valid and subsisting location supported by discovery in compliance with local statute, is wholly void. See: *Hall v. McKimmon*, 193 Fed. 572, 577 (C. C. A. 9); *Becker v. Long*, 196 Fed. 721, 722, 723 (C. C. A. 9).

On the other hand, assuming *arguendo*, that Appellees had complied with the provisions of the Public Resources Code of California governing the posting of their Notices of Location, that fact alone would not deprive Appellants of the right to enter the property peaceably and complete their own location by discovery. Of vital importance on this point is the fact that nothing was done upon the property by Appellees after September 7th until the last week in November [R. 133, 134] They were not in possession of the lands by enclosure by the performance of any work, or in any other manner. At most they did not rise above the status of speculative explorers whose rights, if any, were subject to termination by prior discovery on the part

of Appellants. This proposition is forcibly illustrated in the following cases in the Supreme Court in this Circuit and in California:

In *Erhardt v. Boaro*, 113 U. S. 527, 535, 536 (5 S. Ct. 560), the opinion of the Court contains the following pertinent language:

“In all legislation, whether of Congress or of the State or Territory, and by all mining regulations and rules, *discovery and appropriation are recognized as the sources of title to mining claims*, and development, by working, as the condition of continued ownership, until a patent is obtained. And whenever preliminary work is required to define and describe the claim located, *the first discoverer must be protected in the possession of the claim* until sufficient excavations and development can be made, so as to disclose whether a vein or deposit of such richness exists as to justify work to extract the metal. *Otherwise, the whole purpose of allowing the free exploration of the public lands for the precious metals would in such cases be defeated, and force and violence in the struggle for possession, instead of previous discovery, would determine the rights of claimants.* . . . This allowance of time for the development of the character of the lode or vein does not, as intimated by counsel, give encouragement to mere speculative locations, that is, to locations made without any discovery or knowledge of the existence of metal in the ground claimed, with a view to obtain the benefit of a possible discovery of metal by others, within that time. *A mere posting of a notice on a ridge of rocks cropping out of the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity,*

would be justly treated as a mere speculative proceeding, and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence. Then protection will be afforded to the locator to make the necessary excavations and prepare the proper certificate for record."

In *Belk v. Meagher*, 104 U. S. 279, 287, the Court in determining priorities stated as follows:

"He had made no such location as prevented the lands from being in law vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. . . . No one contends that the defendants effected their entry and secured their relocation by force. They knew what Belk had done and what he was doing. He had no right to the possession, and was only on the land at intervals. There was no enclosure, and he had made no improvements. He apparently exercised no other acts of ownership, after January 1, than every explorer of the mineral lands of the United States does when he goes on them and uses his pick to search for and examine lodes and veins. As his attempted relocation was invalid, his rights were no more than those of a simple explorer. In two months he had done, as he himself says, 'no hard work on the claim,'

and he 'probably put two days' work on the ground.' This was the extent of his possession. . . . The possession by Belk was that of a mere intruder, while that of the defendants was accompanied by color of title."

In *Cole v. Ralph*, 252 U. S. 286, 294, *et seq.* (40 S. Ct. 321), the Court states:

"In advance of discovery an explorer in actual occupation and diligently searching for mineral is treated as a licensee or tenant at will, and no right can be initiated or acquired through a forcible, fraudulent or clandestine intrusion upon his possession. *But if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another enters peaceably, and not fraudulently or clandestinely, and makes a mineral discovery and location, the location so made is valid and must be respected accordingly.* *Belk v. Meagher*, 104 U. S. 279, 287; *Union Oil Co. v. Smith*, 249 U. S. 337, 346-348, and cases cited.

A location based upon discovery gives an exclusive right of possession and enjoyment, is property in the fullest sense, . . . Location is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim."

In *Johanson v. White*, 160 Fed. 901 (C. C. A. 9), the Court states as follows:

"Both the locaters being in possession by common consent, as they were after June 8th, it became a race of diligence between them to discover gold, and

he who first discovered it undoubtedly obtained the prior right. His discovery did not relate back to the date of his location; but his location was made valid by discovery, and took effect from that date, and it gave him the full right in the claim, to the exclusion of all others. This is well established by the authorities."

The foregoing rule obtains in the State of California: *New England Oil Co. v. Congdon*, 152 Cal. 211, 215 (92 Pac. 180); *McCleary v. Braddus*, 14 Cal. App. 60, 66 (111 Pac. 125).

Applying the principles set forth in the foregoing cases, it is apparent that Appellees having failed to discover clay, must yield to the superior right of Appellants by reason of the latters' prior discovery. Appellees did nothing upon the property after posting their Notices of September 6th, 1945, and inserting duplicate Notices in the glass bottles on September 7th. Appellants rightfully posted their Notices on the 7th day of September. Appellees did not remain in possession and took no steps to assert any claims against Appellants on and after the 7th day of September. The Court specifically found that the Appellants did not enter the property forcibly [see Findings XV, XVI, XVII and XIX, R. 47-48]. The record supports, without contradiction, the open and peaceable entry of Appellants in the performance of their excavation work upon each of their claims, as the result of which they discovered the clay and established their location and superior title.

V.

In an Equity Case Where the Findings of Fact Are Against the Uncontradicted Evidence, and the Conclusions of Law and Decree Are Thereby Erroneous, the Circuit Court Will Direct the Lower Court to Render the Proper Judgment.

In an equity case an appeal brings up the entire record and the appellate court is authorized to review the evidence and make such order or decree as should have been made by the trial court. *Keller v. Potomac Electric Co.*, 261 U. S. 428 (43 S. Ct. 445, 449); *Union Central Life Insurance Co. v. Imsland*, 91 F. (2d) 365, 368 (C. C. A. 8); *MacGowan v. Barber*, 127 F. (2d) 458, 461 (C. C. A. 2).

In reviewing the evidence the Circuit Court is not bound by findings which are against the clear weight of the evidence, nor by findings which are in conflict with all of the evidence in the record, touching the fact found. Upon such review and in proper cases the Circuit Court will finally dispose of the litigation; if erroneously decided by the District Court, the appellate court will reverse the decree and order a proper judgment entered. *Hooper v. First Exchange Nat. Bank of Coeur D'Alene*, 53 F. (2d) 593; *U. S. v. Mitchell*, 104 F. (2d) 343, 346.

We urge that the record in this appeal presents the occasion for the proper exercise by the Court of its powers to reverse and enter the decree which should have been originally rendered by the District Court in favor of Appellants. As has been indicated in this brief, the record reveals no conflict of evidence relating to the material issues herein. Without dispute, the evidence shows that the Appellees did not discover mineral at any time; it affirmatively appears that they failed to comply with

the provisions of the Public Resources Code of California requiring the posting of Notices of Location and the performance of one dollar's worth of work per acre upon their claims. On the other hand, and in contrast thereto, the undisputed evidence discloses that Appellants discovered mineral and fully complied with all statutory requirements. It follows, therefore, that Appellees did not establish any right or title to their claims, but, on the contrary, that the Appellants clearly and indisputably proved all the facts necessary to the establishment of their right and title to the lands. Under these circumstances the Circuit Court should reverse the decree and direct the trial court to render a proper judgment quieting Appellants' right and title to their claims as against the Appellees.

Conclusion.

We believe that we have demonstrated herein that the Findings of the trial court are not justified by the evidence and that the decree in favor of Appellees is clearly erroneous. Appellees completely failed to support the allegations of their Complaint; on the contrary; the evidence manifestly requires Findings and a Decree in favor of Appellants who did establish their right and title to the claims involved herein. On principle, precedent and authority set forth in this brief, it is therefore respectfully submitted that the decree of the District Court be reversed with instructions to render a decree in favor of Appellants quieting their title as against Appellees.

Respectfully submitted,

REYNOLDS, PAINTER & CHERNISS,
By LOUIS MILLER,
Attorneys for Appellants.

APPENDIX.

TITLE 43—PUBLIC LANDS; INTERIOR.

Chapter 1—General Land Office.

Appendix—Public Land Orders.

(Public Land Order 287)

California.

Revoking in Part Executive Order 8865 and Opening Lands Under Applicable Laws.

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, and to the act of April 23rd, 1932, 47 Stat. 136, it is ordered as follows:

Executive Order No. 8865 of August 21, 1941, withdrawing public lands for the use of the War Department for combat firing ranges and maneuver purposes, is hereby revoked so far as it affects the following described lands:

San Barnardino Meridian.

T. 14 S, R. 12 E.

Secs. 20, 21, 28 and 29.

The areas described aggregate 2,560 acres.

The jurisdiction over and use of such lands granted to the War Department by Executive Order No. 8865 shall cease upon the date of the signing of this order. Thereupon, the jurisdiction over and administration of such lands shall be vested in the Department of the Interior under the order of October 19, 1920, of the Secretary of the Interior, withdrawing the lands for reclamation purposes under the provisions of the act of June 17, 1902, 32 Stat. 388.

This order shall not otherwise become effective to change the status of the lands until 10:00 A. M. on the 63rd day from the date on which it is signed, at which time the lands subject to valid existing rights and the provisions of the then existing withdrawals, shall become subject to the laws applicable to lands affected by such withdrawals, and to location, entry, and patent, under the general mining laws subject to the terms of the following stipulations and to the regulations contained in Section 185.36 of Title 43 of the Code of Federal Regulations (Circular No. 1275, June 22, 1932, 53 ID 706):

* * * * *

ABE FORTAS,
Acting Secretary of the Interior.

July 6, 1945.

Section 2303 of the Public Resources Code of California provides as follows:

“The location of a placer claim shall be made in the following manner:

(a) By posting thereon, upon a tree, rock in place, stone, post, or monument, a notice of location, containing the name of the claim, name of the locator or locators, date of location, number of feet or acreage claimed, and such a description of the claim by reference to some natural object or permanent monument as will identify the claim located.

(b) By marking the boundaries so that they may be readily traced.

Where the United States survey has been extended over the land embraced in the location, however, the claim may be taken by legal subdivisions and no

other reference than those of such survey shall be required, and the boundaries of a claim so located and described need not be staked or monumented. The description by legal subdivisions shall be deemed the equivalent of marking.”

Section 2304 of the Public Resources Code of California provides as follows:

(a) Within ninety days after the date of location of any lode mining or placer claim hereafter located, the locator or locators thereof shall sink a discovery shaft upon the claim to a depth of at least ten feet from the lowest part of the rim of the shaft at the surface, or shall drive a tunnel, adit, or open cut upon the claim to at least ten feet below the surface.

(b) In lieu of the discovery work required by paragraph (a) of this section, the locator of a placer mining claim may, within ninety days of the date of location, excavate an open cut upon the claim, removing from the cut not less than seven cubic yards of material.

Section 2305 of the Public Resources Code of California provides as follows:

“Within ninety days after the date of location of any placer mining claim hereafter located containing more than twenty acres, the locator or locators thereof shall perform at least one dollar’s worth of work for each acre included in the claim. This work may all be done at one place on the claim if so desired, and shall be actual mining development work exclusive of cabins, buildings, or other surface

structures. Nothing in this section shall be construed as a modification of the requirements of Section 2304 of this code."

Section 2313 of the Public Resources Code of California provides as follows:

"Within ninety days after the posting of his notice of location upon a lode mining claim, placer claim, tunnel right or location, or mill site claim or location, the locator shall record a true copy of the notice together with a statement of the markings of the boundaries as required, in this chapter, and of the performance of the required discovery work, in the office of the county recorder of the county in which such claim is situated. The county recorder shall receive a fee of one dollar (\$1) for this service."

No. 11749.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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Appellants,

vs.

HATTIE M. HOUCK, as Administrator of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA N. SHERARD, HATTIE M. HOUCK, RUTH M. HEBBARD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

Reply Brief of J. A. Jose, Olga Jose, Corda Lancaster, William Lancaster, Ella Jackman, John I. Jackman, George T. Renaker and John S. Patten,
Appellants.

FILED

JUL 13 1948

MICHAEL F. SHANNON,

THOMAS A. WOOD,

PAUL P. O'BRIEN,

1017 Citizens National Bank Building, Los Angeles 13,

Attorneys for Jose Appellants.

TABLE OF AUTHORITIES CITED

STATUTES	PAGE
Civil Code, Sec. 1426-da	7
Civil Code, Sec. 1426-db	8
Civil Code, Sec. 1426-dc	7
Public Resources Code, Sec. 2303.....	9
Public Resources Code, Sec. 2304.....	5, 7, 9
Public Resources Code, Sec. 2304, Subd. (a).....	6, 8
Public Resources Code, Sec. 2304, Subd. (b).....	6, 7, 8
Public Resources Code, Sec. 2305	5, 6, 8, 9
Public Resources Code, Sec. 2306	6, 7
Public Resources Code, Sec. 2306.5.....	6, 7

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Appellees.

APPELLANTS' REPLY BRIEF.

Statement.

The appellees in their reply brief have failed to answer the arguments presented in our opening brief.

We have not, in this reply brief, attempted to analyze the cases cited by the appellees in their brief for the reason that all of the cases cited by appellees follow the rules

set forth in the cases cited in our opening brief, that is to say,

1. There must be a discovery before there can be a valid location.
2. Discovery must be proven by the plaintiffs in order to prove that a valid location exists.
3. That the filing of location notices is of no avail unless preceded by discovery, and that rights intervening prior to discovery take precedence over the mere filing of notices of location.

The appellees contend that the question of discovery is not involved in this action for the following reasons:

That in their complaint [Record, p. 4, par. 6 of the complaint] they pleaded that the lands contained a valuable deposit of Montmorillonite clay and that the appellants in their answers admitted such fact. The appellees, however, overlook the fact that the appellants denied that appellees were the owners or entitled to the possession of the mining claims there described and that the issue in the case was which of the three sets of claimants made valid locations, and that in order to make a valid location there had to be a prior discovery.

The appellees next assert that at the opening of the trial there was a stipulation entered into as follows [Record, p. 63]:

“I think it can be stipulated, your Honor, that the value of mineral deposits on the land just set forth is greatly in excess of the jurisdiction of the court. In other words, it is greatly in excess of the sum of \$3,000.00.”

This stipulation had nothing whatever to do with the question of discovery. It was merely eliminating a part of plaintiffs' proof with respect to jurisdictional amount. The issue in the case remained, who owned the mining claims by reason of compliance with the statutes of the United States and the statutes of the State of California?

The appellees next contend that if the question of discovery is involved, the evidence shows that such discovery was made by the appellees prior to the location of the property on September 7, 1945, and in this connection they state that the witness Lewis made such discovery in the year 1942, and the argument is based upon the following testimony [Record, p. 143]:

"Q. You stated some time ago, I believe, that you were on this property in 1942. A. That is right.

Q. Did you personally at that time do any digging on the property? A. No, I didn't do any digging. I picked up some samples and brought them in and had them analyzed.

Q. Where did you pick the samples from? I mean, from this land described in Plaintiffs' Exhibit '1'? A. Yes.

Q. Some material that you picked up from the ground, or was there a hole in the ground? A. There was a side cliff.

Q. An open face cliff? A. An open face cliff, yes.

Q. Did that material contain Montmorillonite clay that we have referred to in the stipulation on the property? A. According to the analysis by Smith-Emory."

This does not constitute a discovery. First, there is no testimony upon which one of the claims involved in this action that the samples were found on. Second, there is no showing that there was exposed on the side of the cliff a sufficient quantity of Montmorillonite clay to constitute a discovery. Third, this was done when the land was withdrawn from entry; and fourth, the evidence as pointed out in our opening brief shows that the appellees were on this land upon September 6 and September 7, 1945, and that the only thing that they did was to post the land. They made no attempt whatever to ascertain whether or not there was Montmorillonite clay on any or all of the claims. Their testimony is conclusive that they made this attempt commencing in the last week in November, 1945.

Discovery is always an issue where conflicting rights are asserted to mining locations for the very basis of the right, its inception, is the discovery, and in order to prove title, discovery must be proved. It cannot be stipulated to, for the land belongs to the United States, and the United States permits the right to come into existence only upon proof of discovery.

The appellees admit that there is no proof in the record of the amount of work done upon each of the claims. This is fatal to their right to recover. The burden of proving compliance, not only with the statutes of the United States, but with the statutes of the State of California, was upon the appellees, in order to show their title. Failure to make such proof in turn constituted a failure of title, and it is of no avail for the appellees to say that the appellants should have made this proof for them. Not only was there a failure to prove the amount of work

done on any particular claim, but there was a failure to prove a sufficient expenditure to comply with the law. The appellees acknowledge that the time book, which the witness Lewis testified contained a complete record of all of the moneys expended in the performance of the work, shows an expenditure for work done on the property in compliance with Section 2304 and 2305 of the Public Resources Code of California in the sum of \$2085.90. The minimum requirement for the 2560 acres here involved under Section 2304 is the sum of \$2560.00. The requirement in addition to this is compliance with the work required by Section 2304.

Section 2305 provides:

“Additional Work on Certain Placer Claims. Nature and Extent of Work. Construction of Section. Within 90 days after the date of location of any placer mining claim hereafter located, containing more than 20 acres, the locator or locators thereof shall perform at least one dollar’s worth of work for each acre included in the claim. This work may all be done at one place on the claim if so desired, and shall be actual mining development work, exclusive of cabins, buildings or other surface structures. Nothing in this section shall be construed as a modification of the requirements of Section 2304 of this code.”

Section 2304:

“Improvement of Claims. Excavation of Shaft, Tunnel or Open Cut. (a) (Discovery shaft, tunnel, adit or open cut.) Within 90 days after the date of location of any lode mining or placer claim hereafter located, the locator or locators thereof shall sink a discovery shaft upon the claim to a depth of at least 10 feet from the lowest part of the rim of

the shaft at the surface, or shall drive a tunnel, adit or open cut upon the claim to at least 10 feet below the surface. (b) (Open cut on placer claim.) In lieu of the discovery work required by paragraph (a) of this section, the locator of a placer mining claim may, within 90 days after the date of location, excavate an open cut upon the claim, removing from the cut not less than 7 cubic yards of material."

We directed attention in our opening brief to the fact that subdivision (b) of Section 2304 dealt exclusively with a placer claim filed upon by an individual locator, and that for a placer claim located pursuant to Section 2305 of the Public Resources Code, it was necessary to comply with subdivision (a) and sink a discovery shaft to at least 10 feet from the lowest part of the rim of the shaft at the surface or to drive a tunnel, adit or open cut to at least 10 feet below the surface. Compliance with subdivision (a) was had only by the Jose appellants. The appellees and the appellants Hammond made no attempt to comply with this subdivision of Section 2304 of the Public Resources Code of California. That this is the proper construction of the sections will be readily seen from a reading of Section 2306 and Section 2306.5 of the Public Resources Code. 2306.5 is a remedial section, as follows:

"Alternative Work Requirements for Location or Relocation of Certain Placer Claims. As to any placer mining claim which has been otherwise validly located or relocated since the enactment of Sections 1426-da and 1426-dc of the Civil Code, and as to which claim the locator or relocater has not performed the work thereon required by those sections, for the reason that literal compliance therewith was not feasible, the locator or relocater may perfect his

claim by excavating an open cut thereon and removing from the cut not less than 7 cubic yards of material, provided that such work shall be completed within 90 days after the effective date of this section."

Section 1426-da of the Civil Code of California is now Section 2304 of the Public Resources Code above set forth in full.

Section 1426-dc of the Civil Code of California is now Section 2306 of the Public Resources Code of California and deals exclusively with the relocation of claims:

"Relocation of Claims. Improvements Required. Options. The relocation of any lode or placer mining location which is subject to relocation shall be made as an original locaton is required to be made, except the relocater may either sink a new shaft upon the ground relocated to a depth of at least 10 feet from the lowest part of the rim of the shaft at the surface or drive a new tunnel, adit or open cut upon the ground to at least 10 feet below the surface; or the relocater may sink the original discovery shaft 10 feet deeper than it is at the time of relocation; or drive the original tunnel, adit or open cut upon the claim 10 feet further; or in the case of placer mining claims, the relocater may either excavate a new open cut upon the claim, removing from the cut not less than 7 cubic yards of material, or remove from the original open cut not less than 7 additional cubic yards of material."

It will be noted from the above that when the remedial statute, Section 2306.5, was enacted, permitting the removal of 7 cubic yards of material from a placer mining claim, as provided for by subdivision (b) of Section 2304

of the Public Resources Code, which subdivision (b) was added to the law at the same time, that it was not made applicable to a placer mining claim containing more than 20 acres, and that it was not made applicable to any placer mining claim that had been located pursuant to the terms of Section 2305 of the Public Resources Code, which was then Section 1426-db of the Civil Code, showing that the Legislature intended that with respect to placer mining claims containing more than 20 acres, subdivision (a) not subdivision (b) of Section 2304 should be applicable.

The appellees in their brief assert that they complied with subdivision (b) by removing 7 cubic yards from each 160 acre claim. How they arrive at this conclusion, it is difficult to understand, for their testimony was that they spent slightly in excess of \$2600.00. The records that they offered showed that they actually spent \$2085.90, not enough to comply with Section 2305, much less meet the requirements of subdivision (b) of Section 2304, and far less than would be required to meet the requirements contained in subdivision (a) of Section 2304.

The appellees with respect to the Jose appellants make the erroneous statement on page 8 of their brief,

“As to the development work by appellants Jose, *et al.*, they paid out \$1367.00 for the development work they performed, approximately \$700.00 of which was paid to Mr. Jose, one of the appellants, the remainder being paid for operating the bulldozer.”

We cannot believe that the appellees, in making this statement, are serious. The appellants Jose produced as a witness, Charles H. Bratton [Record, pp. 390-398, incl.], and proved by this witness that on each one of the 16 claims involved they performed in excess of \$160.00 worth of work on each claim. By the witness, Joseph F. Golden [Tr. pp. 371-389, incl.], the Jose appellants proved the location of the work on each claim, the size of the holes dug by them, the number of cubic yards of earth removed, and in addition to the above, proved by the witness Lancaster that in compliance with Section 2304 of the Public Resources Code of the State of California, they had expended beyond the requirements of Section 2305 and in compliance with the requirements of Section 2304 of the Public Resources Code the sum of \$1367.00. The Jose appellants proved that in the performance of the work, which work was actually done, they had expended the sum of \$3953.50, not \$1367.00.

The appellees have made no attempt in their answer to answer the argument contained in appellants Jose's opening brief. They have quoted a portion of the testimony of Mr. Lancaster with respect to the location of the claims, and without authority assert that the method used by the Jose appellants does not comply with the law.

Section 2303 of the Public Resources Code, in dealing with surveyed lands, provides:

“Where the United States survey has been extended over the area embraced in the location, however, the claim may be taken by legal subdivision and no other

references than those of such survey shall be required, and the boundaries of a claim so located and described need not be staked or monumented. The description by legal subdivision shall be deemed the equivalent of marking.”

In the case at bar, the Jose appellants complied with this section.

We respectfully submit that the judgment appealed from should be reversed.

Respectfully submitted,

MICHAEL F. SHANNON,

THOMAS A. WOOD,

Attorneys for Jose Appellants.

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Appellants,

vs.

HATTIE M. HOUCK, as Administratrix of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA M. SHEPARD, HATTIE M. HOUCK, RUTH M. HEBBERD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

Reply Brief of Appellants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel.

REYNOLDS, PAINTER & CHERNISS,
1111 Citizens National Bank Building, Los Angeles 13,
Attorneys for Appellants.

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TOPICAL INDEX

	PAGE
Introductory statement	1
The brief of appellees.....	1

I.

Discovery	2
(1) Appellees' contention that no issue of discovery was tendered at the trial of the cause.....	2
(2) Appellees' contention that appellants are "confused" as to the correct definition of discovery and the distinction between discovery of minerals before location and discovery work after location.....	3
(3) Appellees' contention that there was ample evidence to show discovery of minerals by appellees before the locations were filed.....	5

II.

Posting of notices of location by appellees.....	7
(1) Appellees' contention that their postings of the notices of location complied with Section 2303(a) of the Public Resources Code of California.....	7

III.

Posting of notices of location by appellants.....	8
(1) Appellees' contention that appellants used defective Colorado forms for their notices of location.....	8
(2) Appellees' contention that appellants did not take steps to prevent the destruction or obliteration of ap- pellants' notices of location.....	9
(3) Appellees' contention that there was no evidence that the appellants' notice of location, Exhibit "Q," was ever signed	10
(4) The contention of appellees that the original notices of location were admitted by appellants to be invalid....	10

IV.

Appellant's amended notices of location.....	12
(1) The contention of appellees that appellants' amended notices of location, Exhibit KK, failed to comply with the Public Resources Code of California.....	12

V.

Performance of labor.....	15
(1) Appellees' contention that they complied with the pro- visions of Section 2305 of the California Public Re- sources Code	15

VI.

Intervening rights	16
The Jose brief.....	17
Conclusion	20

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Bay State Silver Mining Co. v. Brown, 21 Fed. 167.....	2
Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735.....	16
Bender v. Lamb, 133 Cal. App. 348, 24 P. (2d) 208, cert. den. 291 U. S. 662, 54 S. Ct. 438.....	9, 10
Chrisman v. Miller, 197 U. S. 313, 25 S. Ct. 468.....	2, 3, 5
Cole v. Ralph, 252 U. S. 286, 40 S. Ct. 321.....	4, 16
Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096.....	9
Duryea v. Boucher, 67 Cal. 141, 7 Pac. 421.....	13
Erhardt v. Boaro, 113 U. S. 527, 5 S. Ct. 560.....	2, 16
Garibaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425.....	2, 6
Gwillim v. Donnellan, 115 U. S. 45, 5 S. Ct. 1110.....	2
Hall v. McKinnon, 193 Fed. 572.....	4, 5
Hosmer v. Wallace, 97 U. S. 575, 24 L. Ed. 1130.....	16
Iron Silver Co. v. Mike and Starr Co., 143 U. S. 394, 12 S. Ct. 543	16
Jackson v. Roby, 109 U. S. 440, 3 S. Ct. 301.....	2
Johanson v. White, 160 Fed. 901.....	16
Jupiter Mining Co. v. Bodie Consolidated Mining Co., 11 Fed. 666	6, 10
Miller v. Chrisman, 140 Cal. 440, 74 Pac. 1083.....	16
Mining Creede etc. Company v. Tunnel Company, 196 U. S. 337, 25 S. Ct. 266.....	4
Mitchell v. Hutchinson, 142 Cal. 404, 76 Pac. 55.....	13
New England etc. Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180	2
Pidgeon v. Lamb, 133 Cal. App. 342, 24 P. (2d) 206.....	9
Smith v. Newell, 86 Fed. 56	2
Steele v. Tanana Mines Company, 148 Fed. 678.....	3
Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79.....	14

	PAGE
Thompson v. Spray, 72 Cal. 528, 14 Pac. 182.....	11
Tonopah etc. Co. v. Tonopah Mining Co., 125 Fed. 389.....	10
Treasury Tunnel etc. Co. v. Boss, 32 Colo. 27, 74 Pac. 888.....	10
Union Oil Company v. Smith, 249 U. S. 337, 39 S. Ct. 308.....	4
United States v. McCutcheon, 238 Fed. 575.....	4
Walsh v. Erwin, 115 Fed. 531.....	10
Weed v. Snook, 144 Cal. 439, 77 Pac. 1023.....	4

STATUTES

Civil Code, Sec. 1426(da).....	19
Public Resources Code, Sec. 13.....	18
Public Resources Code, Sec. 2303.....	8, 12
Public Resources Code, Sec. 2303(b)	8
Public Resources Code, Sec. 2304	17, 18, 19, 20
Public Resources Code, Sec. 2304(a).....	17, 18, 19
Public Resources Code, Sec. 2304(b).....	17, 18, 19, 20
Public Resources Code, Sec. 2305	15, 17, 18, 20
Public Resources Code, Sec. 2313.....	11, 12
Statutes of 1939, Chap. 93, p. 1081.....	19
Statutes of 1935, Chap. 839, p. 2260.....	19

TEXTBOOKS

40 Corpus Juris, Sec. 500.....	2
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No. 11749.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER, JOHN S. PATTEN, HARRIS H. HAMMOND, A. L. BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administratrix of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA M. SHEPARD, HATTIE M. HOUCK, RUTH M. HEBBERD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

Reply Brief of Appellants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel.

INTRODUCTORY STATEMENT.

Appellants submit herewith their Reply to the respective Briefs of the Appellees and the Appellants J. A. Jose, *et al.*

THE BRIEF OF APPELLEES.

In their Brief Appellees make several contentions relating to (1) Discovery, (2) Appellees' Notices of Location, (3) Appellees' performance of labor, (4) Appellants' Notices of Location, (5) Recordation of Notices of Location by Appellants, and (6) Intervening Rights.

Each of these points is categorically hereinafter discussed.

I.

Discovery.

- (1) APPELLEES' CONTENTION THAT NO ISSUE OF DISCOVERY WAS TENDERED AT THE TRIAL OF THE CAUSE (Appellees' Brief pp. 3, 14, 16 and 18).

This argument is utterly without merit. By their Complaint herein [R. p. 4], Appellees averred ownership and the right to the possession of the Placer Mining Claims herein involved. This allegation was expressly denied by the Answer of Appellants, who, on the contrary, alleged ownership and the right to possession in themselves (Appellants' Answer and Counter-Claim [R. pp. 20, 23]). Appellees in their Answer to the allegations of the Counter-Claim, specifically denied these averments of Appellants.

By these pleadings there was imposed upon Appellees the burden of proving every element necessary to sustain their title. *Gwillim v. Donnellan*, 115 U. S. 45, 50 (5 S. Ct. 1110); *Jackson v. Roby*, 109 U. S. 440 (3 S. Ct. 301); *Bay State Silver Mining Co. v. Brown*, 21 Fed. 167 (C. C. Nev.); 40 C. J.—Mines and Minerals—Section 500. The allegations of Appellees' Complaint being denied, it was thus incumbent upon them to prove discovery of the mineral herein claimed. *Erhardt v. Boaro*, 113 U. S. 527, 535-537 (5 S. Ct. 560); *Chrisman v. Miller*, 197 U. S. 313, 320, 323 (25 S. Ct. 468); *New England etc. Oil Co. v. Congdon*, 152 Cal. 211 (92 Pac. 180); *Garibaldi v. Grillo*, 17 Cal. App. 540, 542 (120 Pac. 425); *Smith v. Newell*, 86 Fed. 56, 59, 60 (C. C. Utah).

These cases very definitely establish that failure to prove discovery is fatal in an action to quiet title to or for the possession of a mining claim; that neither the posting of notices of location, the proof of a record of a location, nor marking of boundaries on the ground dispenses with proof of discovery; and that not even a stipulation between rival mining claimants that one or the other of the parties has made a discovery is sufficient to satisfy the burden of proof.

- (2) APPELLEES' CONTENTION THAT APPELLANTS ARE "CONFUSED" AS TO THE CORRECT DEFINITION OF DISCOVERY AND THE DISTINCTION BETWEEN DISCOVERY OF MINERALS BEFORE LOCATION AND DISCOVERY WORK AFTER LOCATION (Appellees' Brief p. 10).

We do not deem it necessary to dwell at length upon the bald assertion of Appellees that Appellants are confused as to the meaning of discovery. We rely upon the statutory enactments and the adjudications referred to in our Opening Brief, from pages 19 to 23, as defining the meaning of the word discovery in the law of mining. From these citations it is established as a fundamental rule that there must be discovery of mineral before lands may be appropriated by a claimant, and that discovery is the acquisition of knowledge that a placer claim contains minerals that are reasonably valuable for mining to an extent justifying a reasonably prudent man in expending time and money to develop the claim with the reasonable expectation of finding minerals in paying quantities.

Unless such a discovery is made, a claimant has made no valid location and acquires no title. The contention by Appellees, at pages 9 and 11 of their Brief, that this rule is modified by *Chrisman v. Miller*, 197 U. S. 313 (25 S. Ct. 468), and *Steele v. Tanana Mines Company*, 148 Fed. 678 (C. C. A. 9), is patently incorrect. These cases were cited by Appellants for, and they sustain the proposition that, discovery of mineral in placer mining claims is an absolute condition precedent to the establishment of the claimant's title. See *Chrisman v. Miller*, 197 U. S. 313, 323; *Steele v. Tanana Mines Company*, 148 Fed. 678, 679. The fact that the rule respecting the sufficiency of a discovery is more liberal between rival mineral claimants than between a mineral claimant and an agricultural entryman is irrelevant to the question, for regardless of the

degree of proof of discovery, the fundamental fact remains, that whether the contest be between rival mineral claimants or mineral claimants and others, discovery must be established.

Appellees are likewise in error when they assert, as appears on page 10 of their Brief, that before there can be a location notice there must be a discovery of minerals. This is not the law. The following cases expressly hold that discovery may follow the posting of a location notice: *Cole v. Ralph*, 252 U. S. 286, 296 (40 S. Ct. 321); *Union Oil Company v. Smith*, 249 U. S. 337, 347 (39 S. Ct. 308); *Mining Creede etc. Company v. Tunnel Company*, 196 U. S. 337, 348 (25 S. Ct. 266); *Weed v. Snook*, 144 Cal. 439, 443 (77 Pac. 1023).

We turn next to the argument by Appellees that Appellants have failed to distinguish between discovery of mineral and discovery work after location required by State Statute (Appellees' Brief p. 10). Appellees' remarks in support thereof again demonstrate basic error. Appellees assert that the cases of *U. S. v. McCutcheon*, 238 Fed. 575 (D. C. Cal.), and *Hall v. McKinnon*, 193 Fed. 572 (C. C. A. 9), cited by Appellants at pages 10 and 12 of their Brief, illustrate the distinction. Neither case is open to the erroneous challenge made by Appellees. The *McCutcheon* case had nothing whatsoever to do with the performance of discovery work, required by State Statute. There, the Government asserted title to certain California oil lands upon which defendant had entered, erected monuments and posted and filed notices of location at a time when the lands were open to entry, but without discovery prior to the withdrawal of the land from the

public domain. The very basis of allowing recovery by the Government was the failure of the claimants to prove discovery, as defined in *Chrisman v. Miller*, 197 U. S. 313.

Nor does the *McKinnon* case involve discovery work as required by State Statute. In that case the Court ruled that discovery of gold following the staking of a placer mining claim was sufficient to establish priority against a subsequent locator and discoverer.

(3) APPELLEES' CONTENTION THAT THERE WAS AMPLE EVIDENCE TO SHOW DISCOVERY OF MINERALS BY APPELLEES BEFORE THE LOCATIONS WERE FILED. (Appellees' Brief p. 18.)

At page 4 of their Brief, Appellees refer to the entry on the lands in 1942 by their Mr. Lewis. The record discloses that he did no digging, but merely picked up some unidentified number of samples from the side of a cliff which he was told contained the clay [R. p. 143]. No other evidence of discovery of the mineral appears in the record. The utter insufficiency of proof of discovery through the samples of Mr. Lewis is made clear when tested in the light of the applicable law.

There was no showing where on the property the samples were taken. There is no proof that the samples gave any evidence, reasonable or otherwise, that the lands were valuable for placer mining to an extent justifying a prudent man in expending his time and money in developing the claims with the reasonable expectation of finding mineral in paying quantities. Nothing was tendered by Appellees concerning the quality or extent of the mineral or any

other fact from which the Court could have determined whether a prudent person would have been justified in going forward with exploitation on the basis of Mr. Lewis' samples. The foregoing elements are fundamental in the proof of discovery (see Appellants' Brief p. 21 and cases there cited). The best that can be said for Lewis' samples is that they did not arise above the dignity of mere surface indications which were undefined either as to quality, scope or extent and were therefore, totally insufficient to show discovery. *Jupiter Mining Co. v. Bodie Consolidated Mining Co.*, 11 Fed. 666, 675 (C. C. Calif.); *Garibaldi v. Grillo*, 17 Cal. App. 540, 543-544 (120 Pac. 425).

The attempt by Appellees to bolster their claim of discovery by referring to the stipulation of the parties (Appellees' Brief p. 15) that the value of the mineral deposits was in excess of the jurisdiction of the Court, merely emphasizes the absence of their proof. This stipulation [R. p. 63] had nothing whatsoever to do with any of the activities of any of the parties nor with any issue in the case other than that of the jurisdictional amount of the District Court.

Similarly, the contention of Appellees at pages 3 and 16 of their Brief, that their Application to the Land Department for the reopening of the lands presents "strong evidence of such discovery" is without merit. There is nothing in this Application or any act of the Land Department which indicates a discovery by Appellees, and even if there was, the same would be wholly incompetent as self-serving and hearsay declarations.

II.

Posting of Notices of Location by Appellees.

(1) APPELLEES' CONTENTION THAT THEIR POSTINGS OF THE NOTICES OF LOCATION COMPLIED WITH SECTION 2303(a) OF THE PUBLIC RESOURCES CODE OF CALIFORNIA.

At page 25 of Appellants' Opening Brief it is pointed out that the only posts placed upon the lands by Appellees were those which were placed on September 6th, 1945, at a time when the land was not open to entry. In attempting to avoid the effect of the principle of law that any act or proceeding taken to initiate a mining claim on withdrawn land is void, Appellees claim that they had a right to adopt on September 7th, when the lands were open, their postings of September 6th.

In reply, we urge that implicit in the right to adopt former stakes or monuments is the condition that such stakes or monuments must themselves have been validly placed upon the land. A contrary conclusion would permit the accomplishment by indirection of that which cannot be done directly, to wit: the initiation of any right upon lands withdrawn from entry.

Furthermore, the evidence does not support Appellees' argument that they adopted the postings of September 6th. None of the Appellees testified concerning their purpose in posting the land on that date or their intent in returning on the following day and adding an additional Notice in each bottle. There is no evidence that the Notices placed in the bottles on September 6th were removed or that they were substituted by the Notices of September 7th. On the contrary, it appears that, with the exception of two Notices of Location dated September 7th, all of Appellees' Notices of Located dated September 6th and September 7th were recorded at the same time on Decem-

ber 4th, 1945, in the Office of the County Recorder of Imperial County. The excepted two were recorded on December 5th [R. pp. 101, 106]. All of these duplicates contain the same references to the statement of discovery work performed. In view of the equivocal nature of these acts by Appellees, we urge that the argument that they elected to adopt the postings of September 6th is not sustained. For if that had been their purpose, they would not have relied upon or recorded the Notices of September 6th.

III.

Posting of Notices of Location by Appellants.

(1) APPELLEES' CONTENTION THAT APPELLANTS USED DEFECTIVE COLORADO FORMS FOR THEIR NOTICES OF LOCATION.

On pages 6, 7, 29 and 30 of their Brief, Appellees urge that the Notices of Location posted by Appellants did not contain a statement of the markings of the boundaries and property and that, therefore, there was no compliance with Section 2303 of the California Public Resources Code. This argument is groundless. Section 2303(b) of the California Public Resources Code provides that claims may be taken by legal subdivisions upon lands over which United States Survey has been extended, that in such case the boundaries need not be staked or monumented, and that the description by legal subdivision is the equivalent to marking.

In this cause it sufficiently appears that the United States Survey had been extended over the lands in the location claimed by Appellants [R. p. 64]; in all of Appellants' Notices of Location the respective claims were taken by legal subdivision; therefore, no statement of markings was required. This is the express ruling of the Court in

Pidgeon v. Lamb, 133 Cal. App. 342, 346 (24 P. (2d) 206); *Bender v. Lamb*, 133 Cal. App. 348, 349 (24 P. (2d) 208), Cert. Den. 291 U. S. 662 (54 S. Ct. 438).

(2) APPELLEES' CONTENTION THAT APPELLANTS DID NOT TAKE STEPS TO PREVENT THE DESTRUCTION OR OBLITERATION OF APPELLANTS' NOTICES OF LOCATION. (Appellees' Brief pp. 6-7.)

The implication in this argument that Appellants' Notices of Location were destroyed or obliterated is incorrect as a matter of fact and the further implication that Appellants were under a duty to preserve the Notices is unsound as a matter of law. It is undisputed that the Notices of Location by Appellants remained posted upon the land and were legible as to the entire contents thereof as late as November, 1945 [R. pp. 343, 344], when Appellants performed their discovery work and recorded copies of these Notices. The fact that Exhibit "Q," one of Appellants' original Notices of Location, appeared to be weatherbeaten and portions thereof obliterated by the elements approximately sixteen months after the original posting [R. p. 253], does not affect this case, for it is settled that Notices of Location are not intended to be permanently affixed to the lands, but are for the temporary protection of a locator while the other acts requisite to location are being performed. *Donahue v. Meister*, 88 Cal. 121, 131 (25 Pac. 1096).

Upon the recordation of Appellants' Notices of Location in November, 1946, constructive notice of possession, boundaries and of their claim was furnished and bound all others. *Bender v. Lamb*, 133 Cal. App. 348, 350 (24 P. (2d) 208), Cert. Den. 291 U. S. 662 (54 S. Ct. 438).

Furthermore, it is established that neither Federal nor State Statutes require a locator to take steps or measures to prevent the destruction or obliteration of posted Notices

of Location. The occurrence of such obliteration or destruction without the fault of the locator cannot operate to divest him of his rights. *Walsh v. Erwin*, 115 Fed. 531, 537 (C. C. Calif.); *Jupiter Mining Co. v. Bodie Consolidated Mining Co.*, 11 Fed. 666, 677 (C. C. Calif.); *Tonopah etc. Co. v. Tonopah Mining Co.*, 125 Fed. 389, 392 (C. C. Nev.); *Treasury Tunnel etc. Co. v. Boss*, 32 Colo. 27, 31 (74 Pac. 888); *Bender v. Lamb*, 133 Cal. App. 348 (24 P. (2d) 208), Cert. Den. 291 U. S. 662 (54 S. Ct. 438).

- (3) APPELLEES' CONTENTION THAT THERE WAS NO EVIDENCE THAT THE APPELLANTS' NOTICE OF LOCATION, EXHIBIT "Q", WAS EVER SIGNED. (Appellees' Brief p. 7.)

This argument is without merit. A mere inspection of the Exhibit discloses that the obliteration of not only the signatures but of other typewritten and printed portions thereof is due to obvious weathering. The evidence is uncontradicted that this Notice of Location, as well as all others which were posted by Appellants upon the lands, were signed by them [R. pp. 251-252, 256-258, 260, 266, 275]. The signatures were on all of these Notices as late as November, 1945, and were clearly legible [R. p. 344].

- (4) THE CONTENTION OF APPELLEES THAT THE ORIGINAL NOTICES OF LOCATION WERE ADMITTED BY APPELLANTS TO BE INVALID. (Appellees' Brief pp. 7, 30.)

An examination of the argument advanced by Appellees on this point shows that it is utterly without merit. In support of the argument Appellees urge that counsel for Appellants stated that the purpose of introducing the original Location Notices was ". . . not . . . for the purpose of showing that we complied with any statute,

other than that we have in evidence a duplicate of that which was posted on the property of which we have the oral testimony of the witnesses" (Appellees' Brief p. 30). Mr. Painter, Appellants' counsel, was not offering or referring to the *original* Notices at all, but duplicate copies thereof which had been recorded on September 7th [R. p. 349]. It is obvious that his statement that the offering of the duplicates was ". . . not . . . to show compliance with any statute . . ." is not an admission that the document was invalid. The remark made by Mr. Painter was in response to an objection of the Appellees to the admission of the duplicate copies on the assertion that they were prematurely recorded. This ground of objection was not well taken, since a premature recordation does not vitiate a Notice of Location, *Thompson v. Spray*, 72 Cal. 528, 533 (14 Pac. 182). Nevertheless, the point was not argued and Mr. Painter did not introduce the documents for the purpose of showing compliance with the recording Statute of California, but as cumulative evidence, documentary in nature, to have before the Court and in evidence, duplicates of what had been posted upon the land.

The further argument made at page 30 of Appellees' Brief that the *original* Location Notices were never re-recorded nor introduced at the trial as a proper Notice of Location, and with the implication that recordation and re-recordation of the originals and their introduction as evidence were necessary, is obviously erroneous. The original Notices were posted upon the ground. Such Notices are neither required to be, or are ever, recorded or re-recorded. True copies thereof, and not the originals, are what the law requires to be recorded. California Public Resources Code, Section 2313. While it is true that the original Notices were not introduced in evidence, nevertheless the true copies thereof, hereinabove referred to, were introduced in evidence as proof of Appellants' Notices of Location and the propriety thereof.

IV. Appellant's Amended Notices of Location.

- (1) THE CONTENTION OF APPELLEES THAT APPELLANTS' AMENDED NOTICES OF LOCATION, EXHIBIT KK, FAILED TO COMPLY WITH THE PUBLIC RESOURCES CODE OF CALIFORNIA.

At page 23 of their Brief, Appellees urge

(a) That the original Notices of Location were on Colorado forms which did not contain a statement of markings and performance of discovery work and (b) that the Amended Notices which were recorded did contain such a statement and hence could not be true copies of the posted original Notices of Location. But under Section 2303 of the California Public Resources Code, a statement of the markings is not required, either on the posted or recorded copies of the Notices of Location, when a claim is taken, as here, by legal subdivisions upon lands over which a United States Survey has been extended. Next, there is no requirement for a statement of the performance of discovery work on the posted Notices of Location. It is only upon the recorded copy of the Notices of Location that the locator is required to set forth his statement of discovery work performed within the ninety days after his original posting. Section 2313, California Public Resources Code.

Appellees' final contention on the point of compliance by Appellants with the recording provisions of the California Public Resources Code comes down to this—that the Amended Notices of Location are not substantially true copies of the original posted Notices of Location

because the Amended Notices contain a statement not found in the original Notices, to wit:

“The markings of the boundaries of the aforesaid claim have been dispensed with since the claim has been located and described by legal subdivisions conforming to the United States General Land Office Survey of 1912.”

This quoted statement in the Amended Notices is merely an expression of what the law implies in the original Notices of Location on lands over which the United States Survey has been extended. As heretofore indicated, in each of the Notices of Location posted upon the lands Appellants' claims were taken by specific legal description. Technically, therefore, it was unnecessary to add the clause in the Amended Notices entitled “Statement of Markings of Boundaries.” But it is well settled that surplusage of this nature harms no one and is never construed as vitiating a Notice of Location which is otherwise proper. *Duryea v. Boucher*, 67 Cal. 141, 143 (7 Pac. 421); *Mitchell v. Hutchinson*, 142 Cal. 404, 411 (76 Pac. 55).

Concluding on this point, it is pertinent to indicate here that Appellees knew of all of the acts and proceedings taken by Appellants, from the very inception of the claims. Appellees were aware of Appellants' presence upon the lands on September 7th and their activities in connection with the posting of the Notices of Location [R. pp. 212-213; 279, 281]. On September 7, 1945, Appellants and Appellees were present at the same exact time upon the Southeast quarter of Section Twenty-one [R. pp. 188, 189, 270]. On the Northeast Quarter of Section Twenty-

eight Appellants posted their Notices of Location three minutes before Appellees inserted their duplicate Notice of Location in the glass jar [R. pp. 189, 272]. On the Northwest Quarter of Section Twenty Appellants were prior by almost two hours [R. pp. 196, 197, 276]. On the Southwest Quarter of Section Twenty Appellants were prior by approximately two hours [R. pp. 194, 274-275]. On the Northwest Quarter of Section Twenty-nine Appellants were prior by two hours [R. pp. 195, 196, 275]. On the Northeast Quarter of Section Twenty-nine Appellants were prior by almost three-quarters of an hour [R. pp. 132, 274]. On the Northwest Quarter of Section Twenty-eight Appellants were prior by almost an hour [R. pp. 131, 273].

It is also undisputed that Appellants' posted Notices of Location were upon the lands and visible and legible as late as November or December, 1945. In addition, Appellants' extensive excavation work was apparent to anyone who looked. These conditions existed at the time when Appellees entered the lands to perform their mining development work in the latter part of November, 1945. Appellees thus had actual knowledge at all times of the claims of Appellants, from September 7th, 1945. Since the purpose of posting and recording of a Notice of Location is to give notice of the claim, the rule is settled that acquisition of actual notice and knowledge of such claim precludes attack by a subsequent locator. *Talmadge v. St. John*, 129 Cal. 430, 436, 437 (62 Pac. 79). Appellees therefore have no basis for complaint.

V. Performance of Labor.

(1) APPELLEES' CONTENTION THAT THEY COMPLIED WITH THE PROVISIONS OF SECTION 2305 OF THE CALIFORNIA PUBLIC RESOURCES CODE.

This contention is not sustained by the record, although Appellees claim that they paid "a little over \$2600.00" for mining development work (Appellees' Brief, p. 6). This appears to be based upon the bald assertion of Mr. Lewis that he spent \$160.00 per claim (See Appellees' Brief, p. 21). A mere reference to the time book, Exhibit 45, discloses this error. As pointed out in our Opening Brief at page 27, the time book shows labor expenditures of \$2085.90. This book was made under the direction and supervision of Lewis and was stated by him to contain the payroll "for the digging of the holes" [R. pp. 150, 156]. This was the total amount paid to the laborers. The bankers did not corroborate the expenditure of \$2500.00 for labor, as claimed by Appellees on page 21 of their Brief. The bankers merely testified that they cashed a check in the amount of \$2500.00 for Mr. Lewis and gave him the money. They did not know how much Mr. Lewis paid the laborers nor did they know the amount of their earnings [R. pp. 178-179, 180-181].

Nor did Mr. Lewis testify that the amount that he did spend upon the development of the property was the reasonable value thereof, as claimed on page 22 of Appellees' Brief. He merely testified to the fact of the expenditure and not to the reasonable value.

Clearly, the Appellees failed to meet the statutory requirements of Section 2305 of the Public Resources Code of California. For they not only failed to prove the statutory minimum for the entire acreage, but they also failed to prove the apportionment of whatever they did spend among the various sixteen claims.

VI. Intervening Rights.

At pages 30 to 31 of their Brief, Appellees claim that they are entitled to the status of persons having intervening rights. This contention is wholly without merit for, as we have shown on pages 33 to 37 of our Opening Brief, Appellees were at most speculative explorers whose rights were never vested. Appellants' being first discoverers, and having posted their Notices of Location and completed their mining development work, of which Appellees had knowledge, there is no basis for any claim whatsoever upon the part of Appellees that they had rights which intervened. By the perfection of Appellants' locations, the land was withdrawn and not open to entry at all. *Miller v. Chrisman*, 140 Cal. 440, 446, *et seq.* (74 Pac. 1083); *Hosmer v. Wallace*, 97 U. S. 575, 579, *et seq.* (24 L. Ed. 1130); *Iron Silver Co. v. Mike and Starr Co.*, 143 U. S. 394, 402, 403 (12 S. Ct. 543); *Erhardt v. Boaro*, 113 U. S. 527, 535, 536 (5 S. Ct. 560); *Belk v. Meagher*, 104 U. S. 279, 287 (26 L. Ed. 735); *Cole v. Ralph*, 252 U. S. 286, 294, *et seq.* (40 S. Ct. 321); *Johanson v. White*, 160 Fed. 901 (C. C. A. 9).

THE JOSE BRIEF

The Appellants Jose, *et al.* do not challenge the validity of Appellants' discovery of mineral or the sufficiency of the Notices of Location posted upon the claims or the sufficiency of the copies thereof which were recorded in the Office of the County Recorder of Imperial County. The principal point raised by the Jose group is that Appellants did not comply with Sections 2304 and 2305 of the Public Resources Code of California (Jose Opening Brief, pp. 12-13).

The basis of the Jose argument is the claim that Section 2304 requires a shaft, tunnel or excavation ten feet in depth, which, it is said by them, is included in the provisions of Section 2305 of the California Public Resources Code. An examination of the cited Code sections discloses that this argument is untenable. Section 2304 is divided into two subsections, 2304(a) and 2304(b). It is true that under Section 2304(a) of the Public Resources Code the locator is required to sink a ten foot shaft or open cut upon the claim. It is specifically provided, however, in Section 2304(b) that "*In lieu of the discovery work required by paragraph (a) of this section, the locator of a placer mining claim may, within ninety days of the date of location, excavate an open cut upon the claim, removing from the cut not less than seven cubic yards of material.*" (Italics ours.) Section 2305 is directed to placer claims in excess of twenty acres and provides for the performance of \$1.00 worth of work for each acre included in the claims, and states "Nothing in this section shall be construed as a modification of the requirements of section 2304 of this code."

and expose the deposit. The Legislature eliminated these former requirements and left it to the locators' choice, either to make an excavation ten feet in depth or remove seven cubic yards of material. Section 2305 does not impose any requirement as to excavations, tunnels or shafts. That section merely requires mining development work in the value of \$1.00 per acre upon claims in excess of twenty acres, with the proviso that the section should not be construed as modifying the requirements of Section 2304.

We therefore urge that Appellants were entitled to select between the two modes of excavation work provided for in Section 2304 of the California Public Resources Code. They were entitled to, and did, follow the requirements of Section 2304(b) and in so doing perfected their locations.

Conclusion.

We believe we have fully demonstrated, in this and our Opening Brief, that Appellees have failed to sustain their cause. We urge that Appellants proved every element which the law requires for the establishment of the right and title to a mining claim. It is submitted that the judgment of the Trial Court did not do justice between the parties, that reversible error was committed in awarding judgment in favor of Appellees, that such judgment should be set aside and the Trial Court directed to enter a judgment in favor of the Appellants, quieting their title to the claims herein referred to.

Respectfully submitted,

REYNOLDS, PAINTER & CHERNISS,

By LOUIS MILLER,

Attorneys for Appellants.

No. 11749.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER, JOHN S. PATTEN, HARRIS H. HAMMOND, A. L. BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administrator of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA M. SHEPARD, HATTIE M. HOUCK, RUTH M. HEBBERD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

PETITION FOR REHEARING.

REYNOLDS, PAINTER & CHERNISS,

1111 Citizens National Bank Building, Los Angeles 13,

Attorneys for Appellants.

FILED

JAN 21 1949

PAUL P. O'BRIEN

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TOPICAL INDEX

PAGE

I.

The opinion of the court erroneously determines that the Houck locations were supported by a valid mineral discovery..... 2

II.

The opinion of the court erroneously determines that the Houck locations were supported by performance of required development work under California statute..... 5

III.

The opinion of the court erroneously determines that appellants did not follow the requisite procedure in locating their claims.. 6

TABLE OF AUTHORITIES CITED

CASES	PAGE
Butte and Superior Copper Co. Ltd. v. Clark-Montana Realty Co., 249 U. S. 12.....	9
Charlton v. Kelly, 156 Fed. 433.....	2
Chrisman v. Miller, 197 U. S. 313, 25 S. Ct. 468.....	3, 4
Cole v. Ralph, 252 U. S. 286.....	3, 4
Dennis v. Barnett, 30 Cal. App. 2d 147, 85 P. 2d 916.....	9
Dripps v. The Allison's Mines Company, 45 Cal. App. 95, 187 Pac. 448	9
Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931.....	9
Huckaby v. Northam, 68 Cal. App. 83, 228 Pac. 717.....	9
Stock v. Plunkett, 181 Cal. 193, 183 Pac. 657.....	9
Sydney v. Richards, 40 Cal. App. 685, 181 Pac. 394.....	9
Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79.....	9

STATUTES	
California Public Resources Code, Sec. 2303(b).....	7
California Public Resources Code, Sec. 2305.....	5
United States Code Annotated, Title 30, Sec. 28	6, 7
United States Code Annotated, Title 30, Sec. 35.....	7

No. 11749.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER, JOHN S. PATTEN, HARRIS H. HAMMOND, A. L. BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administrator of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA M. SHEPARD, HATTIE M. HOUCK, RUTH M. HEBBERD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

PETITION FOR REHEARING.

The Appellants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel respectfully petition the Court for a rehearing in this cause upon the following grounds:

I. THE OPINION OF THE COURT ERRONEOUSLY DETERMINES THAT THE HOUCK LOCATIONS WERE SUPPORTED BY A VALID MINERAL DISCOVERY.

II. THE OPINION OF THE COURT ERRONEOUSLY DETERMINES THAT THE HOUCK LOCATIONS WERE SUPPORTED BY PERFORMACE OF REQUIRED DEVELOPMENT WORK UNDER CALIFORNIA STATUTE.

III. THE OPINION OF THE COURT ERRONEOUSLY DETERMINES THAT APPELLANTS DID NOT FOLLOW THE REQUISITE PROCEDURE IN LOCATING THEIR CLAIMS.

Each of these points is hereinafter discussed *seriatim*:

I.

**The Opinion of the Court Erroneously Determines
That the Houck Locations Were Supported by
a Valid Mineral Discovery.**

The only evidence pertaining to discovery was given by Lewis for the Houck group. This evidence is contained on page 143 of the Transcript where Mr. Lewis testified in substance that he was on the property in 1942, that he did not do any digging therein, but that he picked up some samples of the clay on an open-face cliff, which were analyzed as containing Montmorillonite.

In the light of the applicable principles of law, this evidence was wholly insufficient to satisfy the basic requirements of discovery. These requirements are set forth in *Charlton v. Kelly*, 156 Fed. 433 (C. C. A. 9), page 436, in the following language:

“And we held that, *to constitute discovery* sufficient to support the location of a gold placer claim as against another mineral claimant, it is not necessary that gold must have been found thereon in paying quantities, but that *there must have been such a discovery of gold as to give reasonable evidence that the ground is valuable for placer mining*, taking into consideration its character, location and surroundings.”

It is indicated in the Opinion of the Court that the mineral involved in this suit is concealed, but that there are outcroppings in ravines and on the face of cliffs. It has been settled by a long line of decisions that surface indications, outcroppings or mere indications of mineral do not constitute, and are insufficient to form, the basis for discovery.

As is stated in *Chrisman v. Miller*, 197 U. S. 313, 321 (25 S. Ct. 468):

“‘It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as “known” veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation.’”

Furthermore, it is essential that the discovery occur within the limits of the claim. As is stated in *Cole v. Ralph*, 252 U. S. 286, 295:

“While the two kinds of location—lode and placer—differ in some respects, a discovery within the limits of the claim is equally essential to both.”

Appellees did not show a discovery in each of the quarter sections herein involved. Mr. Lewis did not state from what particular portion of the land his samples were obtained. There is a complete absence of any testimony, either by Lewis or any of the Houck group, that a reasonable man would have been justified in expending money in the development of the land, based on the samples which Lewis had obtained.

Furthermore, it is significant that when the Houck group commenced development work, in the latter part of November, 1945, they did not find or discover any clay in the first two sections upon which they performed their work; and as to the other fourteen claims, the record is silent as to the results of their efforts [Tr. pp. 136-137].

Finally, the reference by Lewis to the mineral in the Request for Restoration of Lands to Entry is entitled to no evidentiary weight whatsoever. That statement is a mere self-serving declaration, having no probative force on the issue of discovery.

Cole v. Ralph, 252 U. S. 286, 303 (applying the rule to a Notice of Location).

It is stated in the Opinion that courts have been inclined to leniency on the issue of discovery where the controversy is between adverse mining claimants. That rule, however, presupposes the existence of a valid discovery. The Supreme Court, in *Chrisman v. Miller*, *supra*, at page 323, enunciates the rule that courts are lenient on the issue of discovery between adverse mining claimants, but, in stating that principle, expressly held that there must yet be a discovery. The language of the Court on this point is as follows:

"But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining."

In the light of the foregoing facts and principles of law applicable thereto, we, therefore, respectfully urge that upon the issue of discovery Appellees wholly failed to sustain the requisite burden of proof and that the failure to prove such discovery is fatal to recovery.

II.

**The Opinion of the Court Erroneously Determines
That the Houck Locations Were Supported by
Performance of Required Development Work
Under California Statute.**

Under the provisions of Section 2305 of the California Public Resources Code, Appellees were required to perform at least one dollar's worth of work for each acre included in the claim, namely, a total of \$2560 worth of work for the sixteen claims involved in this cause.

In so far as the expenditures made by the Houck group are concerned, it appeared affirmatively from their own record that they paid \$2085.90 for labor [Pltf. Ex. 45]. In addition to labor, they expended \$317.00 as follows: \$150.00 for picks and shovels; \$5.00 for a steel tape; \$80.00 for gasoline; \$20.00 for canteens and \$62.00 for engineering services. These latter items are not elements of work or labor, but, even if considered with the \$2085.90 which Appellees expended, the total amount is less than the statutory minimum of \$2560.00.

Appellees removed approximately 1436 cubic yards of material. The reasonable value of removing this earth, and the only evidence of the reasonable value thereof, was given by Mr. Wilson, Appellant's engineer, as being in the sum of \$1.50 a yard [Tr. p. 345]. Computation establishes that 1436 times \$1.50, equals \$2154.15 which, again, is less than the statutory minimum.

The testimony referred to in Appellee's Brief, page 22, that Mr. Wilson placed the cost of the removal by hand labor of the dirt at \$3.00 a yard, does not amount to a statement that that is a reasonable value thereof. We have shown in our brief (App. Br. pp. 27-29) that the

law is well established that the cost expended is not equivalent to the required reasonable value of the necessary labor performed. * * * Thus the Court was not entitled to use the \$3.00 a yard statement of Mr. Wilson in evaluating the reasonable worth of the work done by Appellees.

III.

The Opinion of the Court Erroneously Determines That Appellants Did Not Follow the Requisite Procedure in Locating Their Claims.

In its Opinion, the Court states that the law requires that the names of the locators be stated in the notice, citing 30 U. S. C. A., Section 28. We do not believe that the Statute is subject to the construction placed upon it by the Court. The pertinent provisions of Section 28 are as follows:

“The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: *The location must be distinctly marked on the ground so that its boundaries can be readily traced.* All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.”

The requirement that the name or names of the locators, the date of the location and the description of the claims has reference solely to notices which are *recorded*. All of Appellants' *recorded* Notices of Location were signed by them [see Deft. Ex. KK]. In addition, the Notices of Location which were posted by Appellants upon the ground were monumented [Tr. p. 296]; each Notice described the claim legal description, as permitted under 30 U. S. C. A., Section 35 and California Public Resources Code, Section 2303(b). * * * It is clear, then, that the Appellants' Notices of Location are not subject to the objection that they were not signed, under the provisions of 30 U. S. C. A., Section 28.

Under this phase of the case, the Court has determined that Exhibit Q fails to disclose the names of the locators; and yet it was affirmatively testified to by four witnesses, who were unimpeached, that this Notice of Location did bear the signatures of the eight Appellants. Mr. Wallace [Tr. p. 251], Mr. J. C. Bergere [Tr. pp. 256, 257, 260], Mr. Norris, a consulting engineer employed by Appellants [Tr. p. 266, 275] and Mr. Wilson, Appellants' mining engineer [Tr. pp. 343-344], all positively testified to the fact that every one of Appellants' Notices of Location, including Exhibit Q, posted upon the lands claimed, were signed by all eight of the locators. We urge that these witnesses were neither mistaken nor testifying falsely.

To resolve this point, we are willing, and ask the Court to appoint, at our expense, any competent and reputable

examiner of questioned documents for the purpose of making such tests as are necessary upon Exhibit Q, and thereafter report to the Court his findings as to the evidence of signatures upon that document.

We urge that Exhibit Q, never having been admitted into evidence, cannot be used for the purpose of determining the rights of Appellants. The record shows that Exhibit Q was refused admission into evidence and was merely marked as Defendants' exhibit for identification [Tr. p. 252].

Furthermore, the conclusion drawn by the trial court and this Court that Exhibit Q was not signed is not determinative of Appellants' rights in the other fifteen claims upon which they posted their Notices of Location, all of which were signed and properly described and met every statutory requirement, according to the testimony of the four witnesses above referred to.

And, finally, under the facts of this case, where Appellees had knowledge of the contemporaneous activities of Appellants in locating the lands and their claims, priority of right is not to be adjudicated upon the basis of which party presented the more satisfactory evidence of compliance, so long as there was evidence of compliance with statutory enactments. By a long line of decisions, the law is well settled that the posting of a notice of location is merely for the purpose of conveying to the public the information contained therein, and that as between adverse mining claimants a subsequent locator, hav-

ing knowledge of a previous location, cannot avail himself of any claimed defects in the prior location.

Butte and Superior Copper Co. Ltd. v. Clark-Montana Realty Co., 249 U. S. 12;

Stock v. Plunkett, 181 Cal. 193, 194 (183 Pac. 657);

Talmadge v. St. John, 129 Cal. 430, 435, 436, 437 (62 Pac. 79);

Green v. Gavin, 10 Cal. App. 330, 334 (101 Pac. 931);

Sydney v. Richards, 40 Cal. App. 685 (181 Pac. 394);

Dripps v. The Allison's Mines Company, 45 Cal. App. 95, 104 (187 Pac. 448);

Huckaby v. Northam, 68 Cal. App. 83, 88 (228 Pac. 717);

Dennis v. Barnett, 30 Cal. App. 2d 147, 152 (85 P. 2d 916).

In this case it affirmatively appears that on at least 6 of the claims Appellants had posted their Notices of Location, prior to the time when Appellees deposited their additional Notices of Location of September 7th in their respective Mason jars. On 2 claims the parties were posting at the same time.

The following table shows the time of the respective postings:

SECTION 20

NW $\frac{1}{4}$ Appellants posted at 11:20 A. M. [Tr. p. 276].
Appellees deposited at 1:15 P. M. [Tr. pp. 196-197].

SW $\frac{1}{4}$ Appellants posted at 10:26 A. M. [Tr. p. 275].
Appellees deposited at 12:25 P. M. [Tr. p. 194].

SECTION 21

SW $\frac{1}{4}$ Appellants posted at 10:05 A. M. [Tr. p. 272].
Appellees deposited at 10:05 A. M. [Tr. p. 127].

SE $\frac{1}{4}$ Appellants posted at 10:00 A. M. [Tr. p. 270].
Appellees deposited at 10:00 A. M. [Tr. p. 189].

SECTION 28

NW $\frac{1}{4}$ Appellants posted at 10:10 A. M. [Tr. p. 273].
Appellees deposited at 11:04 A. M. [Tr. p. 131].

NE $\frac{1}{4}$ Appellants posted at 10:02 A. M. [Tr. p. 272].
Appellees deposited at 10:05 A. M. [Tr. p. 189].

SECTION 29

NW $\frac{1}{4}$ Appellants posted at 10:30 A. M. [Tr. p. 275].
Appellees deposited at 12:30 P. M. [Tr. p. 195].

NE $\frac{1}{4}$ Appellants posted at 10:22 A. M. [Tr. p. 274].
Appellees deposited at 11:04 A. M. [Tr. p. 132].

Under the rule of law set forth above, it is clear that Appellees, having knowledge of the activities of Appellants upon the land, and knowing that they were there prior to Appellees, and also knowing that Appellants were engaged in making claim to all of the sections involved, are obviously in no position to assert priority, for, as indicated by the decisions we have set forth in our Briefs, the act of posting is but merely a step in the perfection of a valid claim; that until there is an actual discovery of mineral, persons such as Appellees, who are merely speculative locators, can gain no rights and must yield to parties, as Appellants here, who have established their superior right through demonstrable discovery of mineral.

We, therefore, respectfully request that the Court grant this Petition for Rehearing to the end that there be not incorporated in the law of this Circuit a decision which we respectfully urge is contrary to, and not supported by, established principles of law.

Respectfully submitted,

REYNOLDS, PAINTER & CHERNISS,

By LOUIS MILLER,

Attorneys for Appellants.

Certificate of Counsel.

I, LOUIS MILLER, of counsel, for REYNOLDS, PAINTER & CHERNISS, Attorneys for Appellants herein, do hereby certify that in my judgment the Petition for Rehearing is well founded and that it is not interposed for delay.

Dated: This 20th day of January, 1949.

LOUIS MILLER.

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No. 11750

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT

LODGE 727, an unincorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN,
MALCOLM E. KIRK and LOCKHEED AIR-
CRAFT CORPORATION, a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

No. 11750

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT

LODGE 727, an unincorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN,

MALCOLM E. KIRK and LOCKHEED AIR-

CRAFT CORPORATION, a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States

for the Southern District of California,

Central Division

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Answer of Aeronautical Industrial District Lodge 727..	92
Answer of Lockheed Aircraft Corporation.....	89
Appeal:	
Designation of Record and Statement of Points Upon Which Appellant Intends to Rely (Circuit Court)	129
Notice of	115
Certificate of Clerk.....	116
Designation of Record and Statement of Points Upon Which Appellant Intends to Rely (Circuit Court)....	129
Findings of Fact and Conclusions of Law.....	111
Judgment	113
Motion of Intervener for Rehearing or for New Trial..	108
Names and Addresses of Attorneys	1
Notice of Appeal.....	115
Petition for Enforcement of Veterans' Reemployment Rights	2
Exhibit "A." Agreement between Lockheed Air- craft Corporation and Vega Aircraft Corporation and the Aeronautical Industrial District Lodge 727 of the International Association of Machinists Affiliated with American Federal of Labor. Effec- tive Date September 15, 1941.....	11

Petition for Enforcement of Veterans' Reemployment Rights:	Page
Exhibit "B." Agreement between Lockheed Aircraft Corporation and Aeronautical Industrial District Lodge 727 and International Association of Machinists. Effective Date June 4, 1945.....	42
Reporter's Transcript of Proceedings filed June 6, 1947, Memorandum Opinion of.....	117
Reporter's Transcript of Proceedings filed Sept. 9, 1947, Memorandum Opinion.....	121
Stipulation of Facts.....	97

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

HINDIN, WEISS AND GIRARD

111 West Seventh Street

Los Angeles 14, Calif.

For Appellees James L. Campbell et al.:

JAMES M. CARTER

United States Attorney,

RONALD WALKER

JAMES C. R. McCALL, JR.

Assistants U. S. Attorney,

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif.

For Appellee Lockheed Aircraft Corporation:

ROGER B. SMITH

ROBERT H. CANAN

MARK E. TRUE

2555 North Hollywood Way

Burbank, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 6028-B Civil

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, and
MALCOLM E. KIRK,

Petitioners,

vs.

LOCKHEED AIRCRAFT CORPORATION, a corporation,

Respondent.

PETITION FOR ENFORCEMENT OF VETERANS'
REEMPLOYMENT RIGHTS

The petitioners above named respectfully represent:

I.

This petition is filed under the provisions of Section 8(e) of the Selective Training and Service Act of 1940, as amended (50 U. S. C. A. App., Sec. 308(e)), and Section 7 of the Service Extension Act of 1941, as amended (50 U. S. C. A. App. Sec. 357); and jurisdiction of the Court is based thereon.

II.

Respondent is a corporation engaged in manufacturing airplanes at a factory, which respondent maintains, and wherein respondent employs divers persons, located at Burbank, California, within the jurisdiction of this Court. Respondent has been so engaged throughout the period covered by this petition.

III.

The petitioners are honorably discharged veterans of the [2] United States Army, who hold positions as grade "A" field and service mechanics in the employ of the respondent in the operation of said factory. Each petitioner left a position, other than a temporary position, as a field and service mechanic in the employ of the respondent in the operation of said factory, during 1944-1945, and before June 4, 1945, in order to perform training and service in the armed forces of the United States under the requirements of the Selective Training and Service Act of 1940. Pursuant thereto, each petitioner was inducted into the United States Army and thereafter served therein until he satisfactorily completed his period of training and service, and was honorably discharged therefrom, on a day subsequent to June 4, 1945, and received a certificate of such satisfactory completion, pursuant to law. While still qualified to perform the duties of his former position, each petitioner applied to the respondent for reemployment within 90 days after his discharge from the United States Army, and each was reemployed and restored to his position as field and service mechanic in the respondent's employ at said factory. The respective hourly rate of pay of each of the petitioners is as follows: James L. Campbell, \$1.50; Mitchell B. Joplin, \$1.73; and Malcolm E. Kirk, \$1.60.

IV.

Although the petitioners were reemployed and restored to their former positions as aforesaid, each was restored with a loss of seniority, as shown below, and said loss in seniority has resulted in a financial loss to each petitioner.

V.

At the time of the induction of each petitioner into military service, there was in effect between the respondent and its employees, represented by Aeronautical Industrial Lodge #727 of the International Association of Machinists affiliated with the American Federation of Labor, a collective bargaining agreement regulating the wages, hours and working conditions in said factory. [3] Said agreement is dated September 15, 1941, and was effective on that date for the future period of the unlimited national emergency proclaimed by the President of the United States. Said agreement provided in Article III thereof that the seniority of each employee should date from the time of his employment, and that lay-offs should be made as follows:

“In case of a slack in production, layoffs are to be made primarily on the basis of the principle of seniority. Due consideration will be given, however, to (a) knowledge, training, ability, skill and efficiency, and (b) department, record and other factors. If it becomes necessary to reduce the working force in any plant or department, a plan of layoff procedure will be prepared by the management and submitted to the Union for approval. If such plan is not acceptable to the Union the Company agrees to enter negotiations with the Union and to attempt to arrive at a mutually agreeable plan. If, however, at the end of one working week from the date the Company submitted its original plan of layoff procedure to the Union no new plan has been mutually agreed to, the Company may proceed according to its proposed plan of layoff subject to Article II, Section 6.”

Said Article II, Section 6, prescribes a permissible grievance procedure.

No preferential retention, in case of layoffs, was given in said agreement to any union chairman. It was provided in the agreement that the Union should designate in the departments of the plant a department chairman for "approximately every 35 to 50 employees"; and also a senior chairman for each department, or for every 9 department chairmen, or fraction thereof, on each shift of work; and that there would be one union chairman elected for a one-year term. The agreement further provided that upon induction into military service, an employee should be granted a [4] leave of absence therefor, without loss of seniority rights and be reemployed "in preference to all other persons in their occupations with less seniority." A copy of said agreement is attached hereto, marked Exhibit "A" and is incorporated herein. Reference is made to the following sections of said 1941 agreement as the basis of the above statement of the provisions thereof, to wit: Article I, Section 3; Article II, Section 4; Article III, Sections 1, and 5; Article IV, Section 5.

VI.

During the petitioners' absence in military service, and on June 4, 1945, a new and different collective bargaining agreement was entered between respondent and said Lodge #727 I. A. M., in which it was provided that there should be designated by the union in the departments of the plant, a group chairman for approximately every 35 to 50 employees; and a senior chairman for each department, or for every 9 group chairmen, or fraction thereof, on each shift. The agreement provided that seniority should be "the relative status of employees in respect of length of

service with the company"; and that general layoffs should be made as follows:

"(A)—General Layoff Procedure. Layoffs shall be made in order of Company-wide seniority applied by occupation where ability, skill and efficiency are substantially equal. However, in the case of employees with four years' or more seniority, the Company may, in its discretion, retain them in order of their Company-wide seniority, regardless of occupation, where ability, skill and efficiency are substantially equal. Any claim of unjust discrimination in the exercise of such discretion may be taken up as a grievance. Employees who have not acquired seniority rights may be laid off without regard to relative length of service.

"The word 'occupation' as used herein, includes all grades and leadmen within an occupation." [5]

This 1945 agreement provided, however, for preferential retention of the above mentioned group, and senior union chairmen in the event of a general layoff, as follows:

"Section 3—Layoffs (D) Top Seniority for Union Chairmen for Purpose of Layoffs: For the purpose of applying the Temporary and General Layoff Procedures, Union Chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain Chairmen. If the application of the General Layoff Procedure will result in the retention of more of such Chairmen in a group or department than are provided for in Article II, Section 2 of this Agreement, the Company shall prepare and furnish to the Union a list of all Chairmen in the locations where

the surplus exists. The Union shall upon request of the Company promptly designate the Chairmen who are to remain in that capacity, and the Chairmen not to be retained as Chairmen shall be governed by the seniority rules applicable to the layoff of other employees. During a Temporary Layoff and during the period between the first and second steps in an Emergency Reduction of the Working Force, the terms of office of laid-off Union Chairmen shall be deemed to continue."

The agreement provided for reemployment of veterans of the armed forces, as follows:

"Section 6—Employees Entering Armed Forces:

Employees (other than temporary employees) who shall have left the employment of the Company for the purpose of entering the armed forces of the United States, shall be re-employed by the Company in accordance with the provisions of the Selective Training and Service Act of 1940, as such Act may be amended." [6]

A copy of said agreement of June 4, 1945 is hereto attached as Exhibit "B" and incorporated herein by this reference. Reference is made to the following sections thereof as the basis for the provisions outlined above: Article II, Section 2; Article IV, Sections 1, 3, 4 and 6.

VII.

The agreement dated September 15, 1941 remained effective until the agreement of June 4, 1945, was signed, and thereafter the latter has remained in effect to this date.

VIII.

In the latter part of June, 1946, and within one year after the reemployment of each of the petitioners, the respondent made a general layoff of certain field and service mechanics, grade "A" whose employment was covered by the above mentioned agreements, and in the course thereof, each of the petitioners was laid off, but the respondent retained in its active employ numerous workmen in their occupation, including Union chairmen, i. e. group and senior chairmen, with less seniority than petitioners.

At the time of such general layoff, there were many more group and senior chairmen in the petitioners' occupational group than the number provided for in Article II, Section 2 of the Agreement dated June 4, 1945, to wit, one group chairman for every 35 to 50 employees and one senior chairman for each department, or for each 9 chairmen, yet the respondent did not call for or require, a designation of a smaller number of such chairmen to be made by the Union, as provided for in Article IV, Section 3(D) of the agreement, which is set out in full above, as petitioners are informed, believe and state.

IX.

Petitioners Campbell and Kirk were laid off June 21, 1946 and Petitioner Joplin was laid off on June 24, 1946, in the course of such general layoff, but the respondent retained in its active [7] employ in said occupational group more than 3 group chairmen, who had less seniority, i. e., "length of service with the company," than any of the petitioners. The ability, skill and efficiency of the petitioners was substantially equal to that of any of the group or senior chairmen retained in active employment; but regardless of this, the general layoff was made on the

sole basis of Company-wide seniority, and not, on the basis of ability, skill or efficiency, as regards petitioners.

X.

Petitioners protested against their lay-off and the retention of said group and senior chairmen, with less seniority, in respondents' active employment; and the petitioners were restored to active employment, as follows: Campbell and Joplin on July 15, 1946; Kirk, July 16, 1946. By reason of said layoff, the petitioners' lost in wages the following amounts, which they would have earned in the respondent's employ had not said junior group and senior chairmen been retained as aforesaid under the super-seniority provisions of Article IV, Section 3(D), of the 1945 agreement. Petitioners are advised and represent that their said loss in wages was due to the unlawful action of respondent in failing to accord the petitioners their full seniority, without any loss therein under the super-seniority provisions; and that they are entitled to compensation therefor.

XI.

Data concerning the re-employment of each of the petitioners, is as follows:

James L. Campbell: Was originally hired, and has a companywide seniority date of August 17, 1942; terminated to enter the Army February 26, 1944; was honorably discharged October 28, 1945; applied for reemployment November 15, 1945; was reemployed as a field and

service mechanic "A" November 27, 1945; was laid off June 21, 1946 as aforesaid, and rehired or called back to work July 15, 1946; hourly rate of pay, \$1.50; total loss in wages due to layoff, \$168.00. [8]

Mitchell B. Joplin: Originally hired, and has a companywide seniority date of April 19, 1943; terminated to enter the Army May 28, 1945, which he did on June 4, 1945; honorably discharged, November 23, 1945; applied for reemployment December 5, 1945, and was reemployed as field and service mechanic "A" December 10, 1945; was laid off June 24, 1946; hourly rate of pay, \$1.73; total loss in wages due to lay-off, \$124.56.

Malcolm E. Kirk: Originally hired, and has a companywide seniority date of August 5, 1942; terminated to enter the Army May 31, 1944, which he did June 2, 1944; honorably discharged January 12, 1946; applied for reemployment February 8, 1946, and was rehired as field and service mechanic "A" March 7, 1946; was laid off June 21, 1946, as aforesaid, and rehired or called back to work July 16, 1946; hourly rate of pay, \$1.60; total loss in wages due to lay-off, \$190.00.

Wherefore, Petitioners Pray:

1. That the petitioners have and recover of the respondent as and for their loss of wages suffered by reason of respondent's unlawful action in failing and refusing to reemploy them without loss of seniority, and in laying them off while retaining in active employment group and senior chairmen with less company-wide seniority than they, the following sums: James Campbell, \$168.00; Mitchell B. Joplin, \$124.56; Malcolm E. Kirk, \$190.00.

2. That petitioners have all such other further and different relief as they may be entitled to in the premises, and that they have general relief.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief of Civil Division

By James C. R. McCall, Jr.

Assistant U. S. Attorney

Attorneys for Petitioners. [9]

[Verifications.] [10-11-12]

EXHIBIT "A"

AGREEMENT

between

Lockheed Aircraft Corporation

and

Vega Aircraft Corporation

and the

Aeronautical Industrial District Lodge 727

of the

International Association of Machinists
Affiliated with American Federal of Labor

Effective Date September 15, 1941

This agreement constitutes a part of the regulations of the Lockheed Aircraft Corporation and the Vega Aircraft Corporation. Each employee should become familiar with the provisions herein and retain this copy for reference. [13]

* * * * * * * *

PREAMBLE

This Agreement entered into by and between Lockheed Aircraft Corporation, a California Corporation, and Vega Airplane Company, a California Corporation, both hereinafter called "the Company," and Aeronautical Lodge 727 of Burbank of the International Association of Machinists, hereinafter called "the Union," a non-profit association affiliated with the American Federation of Labor, evidences the desire of the parties hereto promote and maintain harmonious relations between the Company and its employees, and the willingness of the Company to deal with them through the Union as their representative. [18]

ARTICLE I.

GENERAL CONDITIONS OF CONTRACT

Section 1—Sole Agreement

This Agreement, when accepted by the parties hereto, and signed by their respective agents thereunto duly authorized, shall supersede all previous agreements by and between the parties hereto, and shall constitute the sole agreement between them.

Section 2—Exclusive Representation

For the period of this Agreement, the Company recognizes and accepts the Union as the sole agency for the

purpose of representing all employees of the Company (except officers of the Company appointed by its Board of Directors, and except monthly salaried executive, administrative and professional employees, and all outside salesmen and representatives, as defined by the Wage and Hour Division of the United States Department of Labor, and except guards and firemen and except supervisory personnel who devote all of their time to supervision) in negotiations pertaining to hours, wages and conditions incident to their employment by the Company.

At the time of employment, each employee shall be given a copy of this Agreement and a letter which shall read as follows:

We are handing to you herewith a copy of the latest Agreement between Lockheed Aircraft Corporation and Vega Airplane Company and Aeronautical Lodge 727 of the International Association of Machinists, affiliated with the American Federation of Labor, arrived at as the result of negotiations between the management of the two Companies and representatives of the Union. [19]

In order that there may be no misunderstanding, the management affirms its sincere belief in the principles of collective bargaining, between management representatives and duly elected representatives of employees, who are members of the Union, and this Agreement enumerates the benefits pertaining to wages, hours and working conditions which the employees now enjoy as a result of that method of dealing.

Since March 12, 1937, Aeronautical Lodge 727, International Association of Machinists, has been

sole representative of Lockheed and Vega employees on matters pertaining to wages, hours and conditions incident to their employment. Your management affirms that the joint relationship with this Union has been continuous and harmonious.

The management does not wish to suggest that membership in the Union is necessary to secured and continuous employment but appreciates the advantage of knowing that the voice of the Union is in effect the voice of all its weekly salaried employees covered by this Agreement. It is our desire that all employees give due consideration to membership in the Union.

Section 3—Period of Agreement

This Agreement shall become effective upon its signature and shall remain in force until July 1, 1943, or for the period of the Unlimited National Emergency proclaimed by the President of the United States, whichever is longer, and thereafter until thirty (30) days after either party hereto shall give to the other written notice of desire for change or termination. During such thirty-day period, conferences shall be held by and between the parties hereto with a view to arriving at further agreement. Notices permitted or required to be served under the terms of this Agreement shall be sufficiently served for all purposes herein when mailed postage prepaid, registered mail, return receipt requested, to Robert E. Gross, or his successor, Lockheed Aircraft Corporation, Burbank, California, and/or Courtlandt S. Gross, or his successor, Vega Aircraft Company, Burbank, Califor- [20] nia, for service upon the Company, and when similarly mailed to Dale O. Reed, President of the Union, at 147 North

Palm Avenue, Burbank, California, or to the successor of him if and when information has been supplied to the Company of the name and address of such successor, and the date of such notice shall be the controlling date for all purposes hereunder.

Section 4—Amendments Permitted

This Agreement may be amended or added to at any time by the written consent of both parties hereto. However, after one year from date of the signing of this Agreement, either party may, after fifteen (15) days' written notice, open negotiations only on items directly affecting wage rates and other financial benefits for employees. However, if the national emergency shall have extended beyond July 1, 1943, either party may at that time, after fifteen (15) days' written notice, terminate the Agreement or negotiate amendments on any item of the Agreement. This Agreement shall remain in full force and effect during negotiations on amendments.

Section 5—Performance Required

Either party hereto shall be entitled to require specific performance of the provisions of this Agreement. Any violation of the provisions of this Agreement on the part of any Company employee in a full-time supervisory capacity shall be considered as a violation of this Agreement on the part of the Company. Any violation of the provisions of this Agreement on the part of Union Chairmen and/or representatives shall be considered a violation of this Agreement on the part of the Union. Time is of the essence of this Agreement.

The waiver of any breach or condition of this Agreement by either party shall not constitute a precedent for any further waiver of such breach or condition.

Section 6—Agreement Not Assignable

This Agreement is not assignable. In the event of change of management, or geographical location of [21] plants, or sale of the Company the present management shall do everything in its power to insure the continuation of this Agreement during its prescribed period.

Section 7—Right to Manage Plant

The Company has and will retain the right and power to manage the plant and direct the working forces, including the right to hire, suspend, discharge, promote, demote, or transfer its employees for just cause, subject to the terms of this Agreement and the grievance procedure established herein.

Section 8—Apprenticeship Agreement

An apprenticeship agreement shall be a part of this Agreement.

ARTICLE II—UNION-COMPANY RELATIONS

Section 1—Strikes and Lockouts

The Union is opposed to strikes. A strike shall be called only after all conciliation, mediation and other methods and procedures provided herein, by Federal law, or by Federal Government agencies, executive orders and proclamations and rules and regulations of governmental administrative bodies, shall have failed to adjust controversies or grievances. Should a strike vote then be called, the Company shall be notified in writing by the President of the Union of the action taken, and under no circumstances shall a strike be effected until expiration of fifteen days after date of such written notice.

No such strikes shall be called for any purposes other than for the adjustment of a controversy or grievance directly affecting the Company and the Union. In the event of an effective strike, the Union and its members shall peaceably withdraw from the property of the Company. [22]

Neither the Union nor any of its members shall participate in or encourage any sit-down or slow-down strikes in or upon the Company's property. Neither the Union nor any of its members shall participate in or encourage against the Company any strike, sit-down, slow-down, or suspension of work effected by others than the Union and its members and those employees who have expressed a desire to be represented by the Union.

The Company is opposed to "lock-outs" and shall cause one only after all possible means to adjust grievances have failed and only after a fifteen-day written notice, but the Company reserves the right to close its plant should it become necessary to protect its property and employees from violence.

Section 2—Labor Relations Committee

A Labor Relations Committee is hereby established, which shall consist of representatives of the Union and the Company. The representatives of the Union shall consist of a Board of five elected members of the Negotiating Board of the Union and the President and another official of the Union. The representatives for the Company shall consist of a like number to be chosen in such a manner as the Company may desire. The Labor Relations Committee may discuss and negotiate all matters pertaining to wages, hours, and working conditions, and shall review and settle all disputes and grievances which may arise

between the Company and the Union and/or Company employees. Individual grievances or items affecting a single department must conform to Section 6 of this Article before being presented to the Labor Relations Committee, but items of a company-wide nature may be presented directly. This Committee may establish subcommittees on a permanent or temporary basis.

A meeting of this Committee may be called by the Union or the Company upon three (3) regular working days' notification.

The decision of the Labor Relations Committee shall be considered as final if a majority of the Union representatives and a majority of the Company representatives concur. If a decision cannot be reached the aid of the Conciliation Service of the U. S. Department of Labor shall be requested. [23]

Section 3—Labor Relations Sub-Committee

There shall be established one Labor Relations Sub-Committee for Lockheed and one Labor Relations Sub-Committee for Vega. Each sub-committee shall consist of three members of the Union and three representatives of management. Each committee shall meet once each week and will handle all grievances which have proceeded through the regular channels as outlined in Section 6 of this Agreement, without a satisfactory settlement having been made, but shall deal only with those grievances which have been before the Industrial Relations office of the Company three (3) regular working days prior to the time of the meeting. Special meetings of these committees may be called. Any meeting may be cancelled or postponed with the mutual consent of the President of

the Union and the Industrial Relations office of the Company.

Section 4—Union Department Chairmen

As designated by the Union there shall be in the departments of the plant a department chairman for approximately every 35 to 50 employees and a senior chairman for each department or for every 9 department chairmen or fraction thereof. This shall apply to each shift. Once each year at a time designated by the Union, the Company shall permit all employees to vote on Company property and during working hours for a Union Chairman to serve them for the coming year. The voting shall be conducted under rules and regulations as may be established by the Union subject to the approval of the Company.

Section 5—Department Representation

It is the desire of the Union and the Company that each department operate in complete agreement between the Union and supervision. Differences arising out of employment shall, wherever possible, be concluded within the department by the cooperation of the Union chairmen, the supervisory staff, and the personnel representatives. [24] In order to accomplish this cooperative action, foremen shall set aside a portion of one day per week to discuss with the senior chairmen any problems arising during the week. At this time, any differences regarding rates of pay, hours, or working conditions, or the provisions of this Agreement, shall be discussed. The employee should first present his differences to the department head, assistant foreman, or sub-foreman (where exists). However, the employee has the privilege of presenting his dif-

ference in written form to the Chairman to be taken up by the Senior Chairman at the time of his regular weekly meeting with the foreman. However, if extremely urgent, any differences may be presented by the Senior Chairman to the foreman upon its receipt.

Section 6—Method of Handling Grievances

Should any difference arise within any department of the Company which cannot be settled according to Section 5 of this Agreement within one week, the matter becomes a grievance and earnest effort shall be made to settle the grievance in the following manner:

Step 1. The written grievance shall be presented by a Business Representative of the Union to the Industrial Relations office. The Industrial Relations office shall investigate the grievance and may confer with the parties and department involved with a view to arriving at a mutually satisfactory agreement.

Step 2. If through this latter method a mutually satisfactory agreement is not reached, the case may be presented to the Labor Relations Sub-Committee of that Company at its next regular meeting.

Step 3. Then, if a mutually satisfactory settlement is not reached within one week, the grievance or problem shall be presented in writing to the Labor Relations Committee, together with the findings of the former reviews.

Section 7—Business Representatives and Union Officials

The Business Representatives of the Union shall have access to the Company's plants or to the departments of [25] the Company's plants to which they are assigned, for the purpose of contacting Department Chairmen. Such visits shall be subject to such regulations as may be made

from time to time by the Company, the U. S. Army, and the U. S. Navy. The Company shall not impose regulations which will exclude the Business Representatives from the plants nor render ineffective the intent of this provision.

No full-time Union official or Business Representative shall discuss any problem with employees (other than Chairmen) or with the supervision of any department, except as provided in Article II, Section 6, of the Agreement.

Section 8—Cooperation

The Union and its members agree to report to the Company any acts of sabotage, subversive activities, theft, damage to or taking of any employee's, Company's and/or Government's property or work in process or materials, or any known threat of sabotage, subversive activities, or damage to or taking of such property, and the Union further agrees if any such acts occur to use its best efforts in assisting the Company and the Government to determine and apprehend the guilty party or parties.

Section 9—Posting Notices

Places shall be provided at locations agreed upon for the posting of the rules and regulations of the Union as well as notices of interest after submission to the Industrial Relations office.

Section 10—Solicitation of Memberships

Employees and Union representatives shall not solicit union memberships or collect dues on Company property on the Company time of any employee, although such activities may be conducted by employees on Company property on the free time of the employees. [26]

Section 11—Reports

The Union and the Company may request the following reports which are to be furnished as soon as possible:

(a) Upon the request of the Company, the Union shall certify to the Company the number of its members.

(b) Upon the request of the Union, the Company shall certify to the Union, the number of employees that are in the various occupational classifications recognized by this Agreement.

(c) Upon the request of the Union, the Company shall furnish the Union with lists of employees in their respective departments, showing rates, classifications, and date of hiring and shifts.

(d) In hiring new employees, the Company agrees to use its best efforts to notify the Union Chairman, in whose group the employees are placed, the name of such employees, their wage rate, shift, and classification within twenty-four (24) hours of the commencement of their employment.

ARTICLE III—EMPLOYMENT CONDITIONS

Section 1—Hiring Date

Six months after an employee is hired his seniority shall be retroactive to the date of his hiring. Rehiring is governed by the sections following.

Section 2—Advancements

In a case of an opening in a higher grade of a classification, the employees with the most seniority in the lower grades in the same branch of the department shall have preference over all others for the advancement.

When there are no competent employees available in this branch of the department, or when no employee in the group can satisfactorily perform the advanced job, [27] employees will be taken from other branches of the same department before hiring new employees or transferring employees from other departments.

In case of an opening for a leadman or group head, the department head involved will, before making the appointment, submit his selection to the Industrial Relations office for approval. With this selection, the department head will submit the names of at least two other employees who are to be considered for the opening, with a written explanation as to the reasons for his selection.

Section 3—Transfers

Transfers to higher rated jobs in other departments shall be governed by the same principles as those pertaining to advancement. Full consideration shall be given to employees' requests for transfers.

Section 4—Quits and Discharges

Any employee quitting the services of the Company or discharged from the services of the Company shall forfeit all seniority. If he is rehired later, the date of rehire shall govern. A five-day period of unreported absence without a reasonable explanation shall be considered a quit.

Section 5—Layoffs

In case of a slack in production, layoffs are to be made primarily on the basis of the principle of seniority. Due consideration will be given, however, to (a) knowledge, training, ability, skill and efficiency, and (b) department

record and other factors. If it becomes necessary to reduce the working force in any plant or department, a plan of layoff procedure will be prepared by the management and submitted to the Union for approval. If such plan is not acceptable to the Union the Company agrees to enter negotiations with the Union and to attempt to arrive at a mutually agreeable plan. If, however, at the end of one working week from the date the Company submitted its original plan of layoff procedure to the Union no new plan has been mutually agreed to, the Company may proceed according to its proposed plan of layoff subject to Article II, Section 6. [28]

To enable the Union to determine that the principle of seniority and the procedure are adhered to, the Company will provide the Union prior to a layoff with a list of all employees it intends to release.

Any employee who has been off the payroll of the Company because of a layoff for a period of sixty (60) days shall lose all former seniority unless he registers in person or by mail at the Industrial Relations office every two weeks, after the expiration of sixty (60) days, in order to preserve his seniority. Upon being rehired, if the above rules have been complied with, the original hiring date shall govern.

Section 6—Sanitary, Safety and Health Conditions

The Company agrees to maintain sanitary, safe and healthful conditions in all its plants and working establishments in accordance with the laws of the State, County and City of its place of operation. Proper and modern safety devices shall be provided for all employees working on hazardous or unsanitary work, such devices

(except articles of clothing) to be furnished by the Company. No employee shall be discharged for refusing to work on a job not made reasonably safe or sanitary for him, or that might unduly endanger his health.

All recommendations and grievances concerning sanitation, safety, health and other working condition factors will be presented through the same procedure as outlined in Article II.

One member of each of the Company's General safety and Sanitation Committees shall be elected by the Union.

Section 7—Hiring Age

The Company agrees that there shall be no established maximum age limit in the hiring of employees.

Section 8—Employment Not Jeopardized

Union membership or legitimate Union activity will not jeopardize an employee's standing with the Company or opportunity for advancement. [29]

ARTICLE IV—EMPLOYEE PRIVILEGES

Section 1—Vacations

(a) Employees who have completed one year's continuous service from the date of hiring, or rehiring, shall be eligible for a vacation with pay, such vacation to be one working week, for which the pay shall be five days at the base rate.

(b) Employees who have completed five years' continuous service from the date of hiring, or rehiring, shall be eligible for an additional week's vacation for which the pay shall be five days at the base rate.

(c) This vacation must be taken within ten months of the date of eligibility or be forfeited.

(d) An employee who is laid off will be granted any vacation for which he is eligible at the time he is laid off.

(e) Vacation time preference shall be given to employees with the greatest seniority.

(f) This section shall become operative at the conclusion of the present vacation season, February 28, 1942.

Section 2—Holidays

The Company recognizes the following six (6) legal holidays: New Year's Day; Memorial Day; Fourth of July; Labor Day; Thanksgiving Day; and Christmas Day.

Full pay (eight (8) hours at straight time) shall be paid to all employees whenever one of these holidays falls on Monday through Friday or on Saturday if the work schedule of the majority of employees includes Saturdays. In addition, straight time shall be paid for hours worked on holidays up to eight (8) hours, thereafter two times the regular rate shall be paid.

No pay under this provision shall be granted an employee during his vacation or leave without pay.

Should a recognized holiday fall upon a Sunday, the Monday immediately following shall be observed as the holiday. [30]

Section 3—Leaves Without Pay

Leaves of absence without pay may be granted employees for a period not to exceed ten (10) working days during the year. For good and sufficient reason the Company may extend the period of leave. The leave of absence shall not in any way jeopardize the employee's standing

with the Company. Upon return from leave of absence, the employee shall be reinstated without loss of seniority and at a rate no lower than the one held previous to the leave.

At such times as the Union may request, the Company will allow Union members leaves of absence without pay for Union business of Lodge 727. The leaves of absence shall in no way jeopardize the standing or rights of the members in their positions. All full-time Union officials who formerly were employees are considered as on leaves of absence, so long as they are employed by the Union.

Section 4—Sick and Injury Leave

In case of illness of the employee, or death in the immediate family, leave with pay will be allowed up to a total of five (5) days a year, no more than three (3) of which will be allowed at one time, all sick leave being subject to verification by the Company's Medical Division.

No employee shall be terminated from the company payroll because of or on account of his illness or non-occupational injury, provided the period of disability is not longer than six (6) months, and shall be reinstated upon recovery from illness after being pronounced physically and mentally fit by the Medical Unit of the Company.

Employees must notify the Company, if possible, within twenty-four (24) hours of physical disability.

Section 5—Military Service

(a) If any employee subject to the terms of this Agreement shall enter into the United States Government military service, either voluntarily or by conscription, such employee shall be granted leave of absence covering the period

of time in which he may be thus engaged in Government service without loss of seniority rights. Upon the termination of such Government service, if within forty- [31] five (45) days such employees shall request re-employment and if the employees are physically and mentally able to do the work available, the Company agrees to re-employ such persons in preference to all other persons in their occupations with less seniority.

(b) All employees granted time off or called to duty for United States Government military training, provided such period of training does not exceed sixty (60) days, in any branch of the military training program, shall receive for a period not to exceed thirty (30) days, the difference between their base military pay and the amount of base pay that would have been earned while working on their regular positions with the Company. This amount will be paid upon return from training and upon receipt of evidence of the amount received while engaged in such training.

Section 6—Educational Facilities

The Company shall continue to cooperate with the Union's Educational Committee to make certain educational facilities available to its employees, in order that they may receive training to qualify them for work in more than one department in the plants, if they so desire.

ARTICLE V—PAY PROVISIONS

Section 1—Periodic and Special Reviews

The rate and record of each employee shall be reviewed every six months with a view to wage adjustment in accord with his proven ability, production, etc. This periodic

review is not to be construed to mean that any employee is guaranteed an increase as a result of this review.

Reviews of employees shall be administered in such a way as to allow the Union to represent the employee at the time of his review. Any review that is not satisfactorily concluded automatically goes to Step 1 of the grievance procedure.

A special review for any employee shall be made in the event of a change of work or other condition which may warrant such special review. [32]

Section 2—Overtime Pay

Hours worked in excess of eight (8) hours in any one day of an employee's work week shall be paid for at one and one-half times the regular rate of the employee.

Time worked in addition to an employee's established work week of forty (40) hours shall be paid for at the rate of one and one-half times the regular rate of the employee.

However, for time worked on the second overtime day of an employee's established work week, or after eight (8) hours of an employee's holiday, two times the regular rate shall be paid. For example, if an employee's established work week is Monday through Friday, then his second overtime day is Sunday for which he shall be paid two times the regular rate.

Section 3—Hours and Days of Work

(a) For all employees, eight (8) hours shall constitute a standard day's work to be performed within nine (9) consecutive hours.

(b) In the factory, the standard day shift shall be from 7:00 a.m. to 3:30 p.m.; the standard night shift shall be from 4:00 p.m. to 12:30 a.m.; and the standard third shift shall be from 12:30 a.m. to 7:00 a.m.

(c) In the office and technical departments, the standard day shift shall be from 8:00 a.m. to 4:45 p.m., or 7:30 a.m. to 4:00 p.m. or 4:15 p.m., except where the nature of the work requires that factory hours be maintained.

(d) All deviations from the standard shift hours shall be cleared with the Union and mutually agreed upon.

(e) Five (5) days, Monday through Friday, shall constitute the standard work week unless or until the Company is instructed by the Federal Government to alter or change the work schedule now in effect. However, the Company reserves the right to engage, alter, or rotate maintenance, personnel service, administrative service, or employees engaged in preparing the payroll to work five (5) consecutive days other than those constituting the standard work week. It is specifically agreed that these employees will not be engaged in production work. [33]

(f) All Sunday overtime shall be voluntary on the part of the employee.

Section 4—Premium for Hours and Days of Work

(a) Night shift employees shall receive a bonus of six (6) cents an hour.

(b) Third shift employees shall receive eight (8) hours' pay plus a six (6) cent an hour bonus for working six and one-half ($6\frac{1}{2}$) hours.

(c) All employees working other than the standard work week shall receive a premium of three (3) cents an hour in addition to other bonuses.

Section 5—Payroll Deductions—Union Fees

Payroll deductions for Union fees shall be made only upon receipt by the Company of written instructions from the individual employee and shall continue until cancelled in writing.

(a) The Company, subject to the above regulations, shall deduct from the pay check issued the second Friday of each month the Union dues for that month and shall forward same to the Financial Secretary of the Union, and shall be responsible to him for all such dues collected. In the case where there are no earnings by the employee during this week, a double deduction shall be made the following month. The Company shall not, however, be responsible for nonpayment of any dues of any Union member in the absence of written instructions from the employee to make deductions from pay therefor.

(b) Cancellation of payroll deductions for Union dues shall be made in the following manner: The employee shall give notice, in writing, of his or her desire for deductions to stop, and be delivered by him or her to the business office of the Union. Such cancellation must be delivered by the first day of the month for which the cancellation becomes effective. The Union shall forward this notice to the Industrial Relations office of the Company.

(c) Union membership fees shall be deducted upon the presentation to the Company of authorization signed by the employees. [34]

Section 6—Payroll Deductions—Company Reimbursement

Payroll deductions may be made to reimburse the Company as follows:

(a) All cost of tools and equipment issued to an employee but not returned by him, such cost to be subject to wear of the tools.

(b) For each tool check lost and not returned, the sum of twenty-five (25c).

(c) For money paid by the Company to a creditor or officer of the law for an indebtedness of an employee, providing demand is made upon the Company according to law.

(d) For any indebtedness due to the Company covering purchases made by an employee through the Company.

(e) For any loans or advances made to the employee by the Company.

(f) For each employee identification card or identification badge lost or destroyed, a sum of One Dollar (\$1.00).

(g) For a lost key, a sum of One Dollars (\$1.00).

Section 7—Report Time

An employee called to work shall receive a minimum of four (4) hours' pay in the shift to which he is called.

Section 8—Pay Periods and Methods

Pay checks for each employee shall be issued each Friday and shall represent the earnings of the employee to and including the previous Friday.

Section 9—Lost Time

Deductions for time off, whether due to tardiness or other causes, shall not be in excess of actual time lost.

Section 10—Change in Working Schedule

In the event of instructions from the Federal Government to alter or change the working schedule now in [35] effect, the Company may upon 15 days' written notice re-open negotiations with the Union to the end of amending such section of this contract as pertain to hours of work and/or overtime pay for the sole purpose of considering the objectives desired by the Government.

ARTICLE VI—PAY RATES

Section 1—Blanket Rate Increase

Each employee on the payroll of the Company as of July 1, 1941, shall receive an increase of \$4.00 on his basic weekly rate. This increase of \$4.00 per week shall be retroactive to July 1, 1941.

Section 2—Starting Rates of Pay

Employees shall receive a minimum rate of \$24.00 per 40-hour week, which shall be increased to \$26.00 per 40-hour week at the end of a period of four (4) full weeks from the date of employment and further increased to a minimum of \$28.00 per 40-hour week at the end of a period of eight (8) full weeks from the date of employment, and further increased to a minimum of \$30.00 per 40-hour week at the end of a period of twelve (12) full weeks of employment. No further automatic increases are mandatory.

Upon the completion of an additional twelve (12) working weeks, at a rate of no less than \$30.00 per 40-hour week, each employee shall be classified and receive the minimum rate of pay for the classification.

Should any employee fail to make the progress necessary to merit an increase during this probationary period, this fact shall be deemed sufficient ground for immediate dismissal or transfer to another occupation, at the discretion of the Company.

The minimum starting rates of pay as outlined in this section shall be effective retroactive to July 1, 1941.

Section 3—Part-Time Supervision

Under Article 1, Section 2, full-time supervisory employees are excluded from this Agreement. Part-time [36] supervisory employees (at present designated as Leadmen and Group Heads) are represented by this Agreement. Employees who are responsible for the activities of a group and who spend a portion of their time supervising and part of their time working shall be considered part-time supervisory employees. Employees working in this classification shall be paid six (6) cents an hour more than the highest paid in their group.

Section 4—Application of Rate Changes

During a period of sixty (60) days from the date of the signing of this Agreement, there shall be no rate changes or rate reviews. During this period, the new starting rates and the blanket increase provided herein will be applied to all eligible employees and pay checks covering the retroactive features of this Agreement will be prepared. At the end of this period, the review provisions outlined in Article V, Section 1, will become effective.

In applying the new starting rates and the blanket increase the Company will first apply the \$4.00 blanket increase and then make any adjustments necessary to meet the requirements of the new minimum starting rates as outlined in Section 2 of this Article.

Section 5—Changes in Rate Schedule

It is recognized that changing conditions and circumstances may, from time to time, require adjustment of wage rates because of inequalities, development of new manufacturing processes, changes in the content of jobs, or mechanical improvements brought about by the Company in the interest of improved methods and product. Under such circumstances the following procedure shall apply:

(1) When a new job or position is established:

The Company will develop an appropriate rate and establish the rate to cover the job or position in question. The Union shall be informed by the Company in advance concerning such rates. The rate established may be opened for negotiations upon the request of the Union.

(2) When changes are made in equipment, method of processing, material processed, or quality or production [37] standards which would result in a substantial change in job duties or requirements; or where, over a period of time, an accumulation of minor changes of this type have occurred, which, in total, have resulted in a substantial change in job duties or requirements; or where a new job or position changes the job duties of an existing job, the Company may establish new rates which may be opened for negotiation upon request of the Union.

The acceptance and agreement to all of the above terms and conditions by either or both parties hereto are conditional upon the approval of the Office of Production Management, the War Department and the Navy Department.

Signed this fifteenth day of September, 1941.

For the Union

Negotiating Committee

Dale O. Reed President Aeronautical Lodge #727,
I. A. M.

Lyle J. Aewey Recording Secretary

R. Cecil Manneny Charles L. Baugh Thomas E. Mc-
Nett Charles H. Jones Theo. H. Sorenson

For the Company

Robert E. Gross President Lockheed Aircraft Corpo-
ration

Cyril Chappellet Secretary Lockheed Aircraft Corpo-
ration Vega Airplane Company

R. A. Von Haker Vice-Pres. in Charge of Mfg. Lock-
heed Aircraft Corporation

H. E. Ryker Vice-Pres. in Charge of Mfg. Vega Air-
plane Company

R. Randall Irwin Industrial Relations Director Lock-
heed Aircraft Corporation Vega Airplane Company

Approved:

Chas. Tigar Business Representative Aeronautical
District Lodge #22

Geo. C. Castleman Vice-President, International Asso-
ciation of Machinists [38]

SUPPLEMENTAL AGREEMENT

It is hereby agreed by each of the undersigned that the existing agreement, bearing the effective date of September 15, 1941, between Lockheed Aircraft Corporation, a California corporation, and Vega Airplane Company, a California corporation, and Aeronautical Lodge 727 of Burbank of the International Association of Machinists, a non-profit association affiliated with the American Federation of Labor, shall be supplemented and amended as follows:

1. Vega Aircraft Corporation, a California corporation, acknowledges that it is the successor in interest of Vega Airplane Company, a California corporation, and hereby agrees to accept the benefits, and to be bound by each and all of the obligations, of the above described existing agreement of September 15, 1941, and the supplements and amendments to said existing agreement herein contained, in the same manner, and to the same extent, as its predecessor, Vega Airplane Company.

2. Aeronautical Industrial District Lodge 727, of Burbank, California, of the International Association of Machinists, a non-profit association affiliated with the American Federation of Labor, acknowledges that it is the successor in interest of Aeronautical Lodge 727 of Burbank of the International Association of Machinists, a non-profit association affiliated with the American Federation of Labor, and hereby agrees to accept the benefits, and to be bound by each and all of the obligations, of the above described existing agreement of September 15, 1941, and the supplements and amendments to said existing agreement herein contained, in the same manner, and to the same extent, as its predecessor, Aeronautical Lodge 727 of Burbank.

3. Page 3 of said existing agreement of September 15, 1941, constituting the Preamble, shall be amended to read as follows:

“This agreement entered into by and between Lockheed Aircraft Corporation, a California Corporation, and Vega Aircraft Corporation, a California Corporation, both hereinafter called ‘the Company,’ and the Inter- [39] national Association of Machinists, Aeronautical Industrial District Lodge 727, of Burbank, California, hereinafter called ‘the Union,’ a non-profit association affiliated with the American Federation of Labor, evidences the desire of the parties hereto to promote and maintain harmonious relations between the Company and its employees, and the willingness of the Company to deal with them through the Union as their representative.”

4. The letter to employees provided for and contained in section 2 of Article I of said existing agreement shall be amended to read as follows:

“We are handing to you herewith a copy of the latest Agreement between Lockheed Aircraft Corporation and Vega Aircraft Corporation and Aeronautical Industrial District Lodge 727, of Burbank, California, of the International Association of Machinists, affiliated with the American Federation of Labor, arrived at as the result of negotiations between the management of the two Companies and representatives of the Union.

“In order that there may be no misunderstanding, the management affirms its sincere belief in the principles of collective bargaining, between manage-

ment representatives and duly elected representatives of employees, who are members of the Union, and this Agreement enumerates the benefits pertaining to wages, hours and working conditions which the employees now enjoy as a result of that method of dealing.

"Since March 12, 1937, Aeronautical Industrial District Lodge 727, of Burbank, California, International Association of Machinists, has been sole representative of Lockheed and Vega employees on matters pertaining to wages, hours and conditions incident to their employment. Your management affirms that the joint relationship with this Union has been continuous and harmonious.

"The management does not wish to suggest that membership in the Union is necessary to secured and continuous employment but appreciates the [40] advantage of knowing that the voice of the Union is in effect the voice of all its weekly salaried employees covered by this Agreement. It is our desire that all employees give due consideration to membership in the Union."

5. The name "Aeronautical Lodge 727" appearing in the description of signatories at page 24 of said existing agreement, shall be amended to read "Aeronautical Industrial District Lodge 727, of Burbank, California."

6. The name "Vega Airplane Company" appearing in Section 3, Article I, page 6 of said existing agreement and in the description of signatories at page 24 of said existing agreement shall be amended to read "Vega Aircraft Corporation."

7. It is further understood and agreed by each of the undersigned that wherever in said existing agreement of September 15, 1941, the term "Company" appears, said term shall include "Vega Aircraft Corporation," a California corporation, in place of "Vega Airplane Company"; and that wherever in said agreement "Vega" appears, said term shall mean and refer to "Vega Aircraft Corporation," a California corporation in place of "Vega Airplane Company"; and that wherever in said agreement the terms "Union" or "Lodge 727" or either of them appears, said terms shall mean and refer to "Aeronautical Industrial District Lodge 727, of Burbank, California" in place of "Aeronautical Lodge 727 of Burbank."

8. It is further agreed by each of the undersigned that the title "Aeronautical Lodge 727 of Burbank" appearing on the title page of said existing agreement of September 15, 1941, and on each side of the payroll deduction card inserted in said agreement immediately following the title page, and on each side of the membership application card inserted at the end of said agreement, shall be in each instance amended to read "Aeronautical Industrial District Lodge 727, of Burbank, California."

9. It is further agreed by each of the undersigned that the respective benefits contained in said existing agreement of September 15, 1941, and the supplements and [41] amendments to said existing agreement herein contained, shall accrue to, and vest in, each of the undersigned, and that other than as set forth in the sup-

plements and amendments herein contained, said existing agreement of September 15, 1941, shall be and remain in full force and effect for the period stated in Section 3 of said agreement.

Dated, this 31st day of August, 1942.

For the Union

Dale O. Reed President Aeronautical Industrial District Lodge 727, I. A. M.

W. M. Holladay Recording Secretary

Thomas E. McNett Pat Daly Robert Potter Fred L. Moore

For the Company

Robert E. Gross President Lockheed Aircraft Corporation

Cyril Chappellet Vice-Pres. - Lockheed Aircraft Corporation Secretary - Vega Aircraft Corporation

R. A. Von Haker Vice-Pres. in Charge of Mfg. Lockheed Aircraft Corporation

H. E. Ryker Vice-Pres. in Charge of Mfg. Vega Aircraft Corporation

R. Randall Irwin Industrial Relations Director Lockheed Aircraft Corporation Vega Aircraft Corporation
Approved:

Geo. C. Castleman Vice-President, International Association of Machinists [42]

* * * * *

EXHIBIT "B"

AGREEMENT

between

Lockheed Aircraft Corporation
and

Aeronautical Industrial District Lodge 727
and

International Association of Machinists

Effective Date June 4, 1945 [45]

* * * * * * * *

AGREEMENT

Between

Lockheed Aircraft Corporation, and
The International Association of Machinists and
Aeronautical Industrial District Lodge 727

PREAMBLE

This Agreement entered into by and between Lockheed Aircraft Corporation, a California corporation, hereinafter called "the Company," and the International Association of Machinists and Aeronautical Industrial District Lodge 727, North Hollywood, hereinafter called "the Union," a non-profit organization affiliated with the American Federation of Labor, evidences the desire of the parties hereto to promote and maintain harmonious relations between the Company and its employees, and the willingness of the Company to deal with them through the Union as their representative.

ARTICLE I

GENERAL CONDITIONS OF CONTRACT

Section 1—Sole Agreement

This Agreement, when accepted by the parties hereto, and signed by their respective agents thereunto duly authorized, shall supersede all previous agreements by and between the parties hereto, and shall constitute the sole agreement between them.

Section 2—Exclusive Representation

(A) Definition of Bargaining Unit

For the period of this Agreement, the Company recognizes and accepts the Union as the exclusive representative of all the employees of the Company, except those listed in Subsection (B), for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. At the time of employment, the Company shall give each employee a copy of this Agreement.

(B) Employees Excluded from Bargaining Unit

(1) Officers of the Company appointed by its Board of Directors; [48]

(2) Salaried executive, administrative and professional employees, as defined by the Wage and Hour Division of the United States Department of Labor;

(3) All outside salesmen and representatives, as defined by the Wage and Hour Division of the United States Department of Labor;

(4) Guards;

(5) Firemen employed in plants outside the State of California;

(6) Employees in the occupations listed below for whom the National Labor Relations Board designated another collective bargaining agent, including employees in the classification of Field Service Man who upon investigation are shown to be engineering employees temporarily assigned to field duty:

Aerodynamicist	Standards Engineer
Aerodynamics Engineer	Engineering Drawings
Construction Engineer	Checker
Contract Specifications	Engineering Liaison Man
Engineer	Engineering Technician
Design Specialist	Flight Test Analyst
Development Liaison	Flight Test Engineer [49]
Engineer	Loftsmen
Draftsman	Manufacturing Engineer
Electrical Engineer	Material Analyst
Engineering Assistant	Mathematician
Engineering Designer	Mechanical Design Engineer
Engineering Draftsman	Stress Analyst
Process Analyst	Structures Engineer
Process Engineer	Technical Computer
Procurement Engineer	Technical Writer
Production Design Engineer	Time Study Man
Research Engineer	Tool Engineer
Research Laboratory Analyst	Tool Research Analyst
Salvage Engineer	Weight Analyst
Service Engineer	Weight Control Engineer
Staff Engineer	Wind Tunnel Test Engineer
Standards Analyst	

Section 3—Period of Agreement

This Agreement shall remain in full force and effect until July 1, 1946, or for a period of one year from the date of its execution, whichever is the longer, and thereafter until amended or terminated as hereinafter provided. On June 15, 1946, or at the end of such one year period, whichever is the longer, or on any date thereafter, either party may give to the other written notice of desire for modifications or amendments. In addition thereto, on or after the National War Labor Board Directive Order of March 3, 1943, as heretofore or hereafter amended shall have been terminated or shall have ceased to be effective, either party may give to the other written notice of a desire for modifications or amendments of wage rates and other financial benefits under this Agreement. Any notice given under this Section for modifications or amendments shall specify the modifications or amendments desired and the parties agree to commence negotiations for such modifications or amendments within fifteen (15) days after the giving of such notice. In the event of the failure of the parties to reach an agreement on modifications or amendments within forty-five (45) days after the giving of such written notice either party may terminate this Agreement by written notice to the other.

In the event of instructions from the Federal Government to alter or change the working schedule now in [50] effect, the Company may upon fifteen (15) days' written notice reopen negotiations with the Union to the end of amending such sections of this contract as pertain to hours of work and/or overtime pay for the sole purpose of considering the objectives desired by the Government.

Nothing herein shall preclude the Union from Petitioning the National War Labor Board for modification of its Directive Order of March 3, 1943, in the event that the Little Steel Formula should be modified.

Section 4—Performance Required

Either party hereto shall be entitled to require specific performance of the provisions of this Agreement. Any violation of the provisions of this Agreement on the part of any Company employee in a full-time supervisory capacity shall be considered as a violation of this Agreement on the part of the Company. Any violation of the provisions of the Agreement on the part of Union Chairmen and/or representatives shall be considered a violation of this Agreement on the part of the Union. Time is of the essence of this Agreement.

The waiver of any breach or condition of this Agreement by either party shall not constitute a precedent for any further waiver of such breach or condition.

Section 5—Agreement Not Assignable

This Agreement is not assignable. In the event of change of management, or geographical location of plants, or sale of the Company, the present management shall use its best efforts to insure the continuation of this Agreement during its prescribed period.

Section 6—Right to Manage Plant

The Company has and will retain the right and power to manage the plant and direct the working forces, including the right to hire, to suspend or discharge for just cause, to promote, demote and transfer its employees, subject to the provisions of this Agreement. Any claim

that the Company has exercised such right and power contrary to the provisions of this Agreement may be taken up as a grievance.

Section 7—Apprenticeship Agreement

The Company shall maintain an apprenticeship agreement which shall be the subject of a separate agreement [51] between the Company and the Union and the California State Apprenticeship Council.

Section 8—Union Security

The National War Labor Board Directive Order of September 20, 1945 (Case No. 111-16460-D) provides as follows:

“(a) All employees, who, on October 9, 1945, are members of the Union in good standing in accordance with its Constitution and by-laws, and all employees who become members after that date, shall, as a condition of employment, maintain their membership in the Union in good standing for the duration of the collective agreement in which this provision is incorporated, or until further order of the Board.

“The Union shall, immediately after the aforesaid date, furnish the National War Labor Board with a notarized list of its members in good standing as of that date.

“The Union, its officers and members shall not intimidate or coerce employees into joining the Union or continuing their membership therein.

“(b) If a dispute arises as to whether an employee (1) was a member of the Union on the date specified above or (2) was intimidated or coerced during the fifteen-day escape period into joining the Union or continuing his membership therein, such dispute may be submitted for determination by an arbitrator to be appointed by the National War Labor Board. The decision of the arbitrator shall be final and binding upon the parties.

“(c) If a dispute arises as to whether an employee (1) has failed to maintain his membership in the Union in good standing after the aforesaid date, or (2) was intimidated or coerced into joining the Union after the aforesaid date, such dispute may be submitted for determination by an arbitrator to be selected in the manner provided by the contract of the parties, or if no such provision exists, to be selected by special agreement. In the absence of such a contract provision or special agreement, the arbitrator will be selected by the National War Labor Board, on due application. The decision of the arbitrator shall be final and binding upon the parties. [52]

“*The Company for said employees, shall deduct from the first pay of each month the Union dues for the preceding month and remit the same to the duly designated officer of the Union. The initiation fee of the Union shall be deducted by the Company and remitted to the Union in the same manner as dues collections.”

*This paragraph is applied as provided in Article VII, Section 5 of this Agreement.

ARTICLE II

UNION-COMPANY RELATIONS

Section 1—Strikes and Lockouts

For the duration of this Agreement the Union agrees that it will not cause or engage in any strike, slowdown or stoppage of work, and the Company agrees that it will not cause or engage in any lockout.

Section 2—Union Chairmen

As designated by the Union there shall be in the departments of the plant a Group Chairman for approximately every 35 to 50 employees and a Senior Chairman for each department or for every 9 Group Chairmen or fraction thereof. This shall apply to each shift. Once each year at a time designated by the Union, the Company shall permit all employees to vote on Company property and during working hours for Group Chairmen to serve them for the coming year. The voting shall be conducted under rules and regulations as may be established by the Union subject to the approval of the Company.

The Union will deliver to the Company once each month a current list of Senior Chairman by departments. The Union also agrees promptly to deliver to the Company written notices of any changes on such lists. As to any Senior Chairman of whose status as such Chairman the Company has had seven (7) days' written notice, the Company will notify the Union four (4) days prior to the effective date of any permanent transfer of such Chairman.

Senior Chairmen will be permitted to take the necessary time off from work for the following Company-Union business:

(1) For the meetings with the Department Head provided for in Article III, Section 1. [53]

(2) For the weekly meeting with the Personal Representative to represent employees as provided for in Article VII, Section 1.

(3) For discussion with the Department Head of emergency complaints and grievances of employees.

Senior Chairmen and Group Chairmen will be permitted to take the necessary time off from work for the following Company-Union business:

(1) For so much of one-half hour of the shift, at a time mutually agreed upon by the Senior Chairman and the Foreman (normally the last half hour of the shift) as is required for Group Chairmen and Senior Chairmen to contact each other, for Chairmen to contact employees who have filed written grievances and for employees who have complaints to contact Chairmen.

(2) For discussion within the department with an authorized Business Representative of the Union when the latter finds it necessary to contact the Chairman on Company-Union business.

(3) For discussion with an employee of the employee's emergency complaint where the employee has obtained permission of his immediate full-time supervision to leave his work.

It is agreed that the contacts on Company time which are provided for in this Section will be no more frequent and no longer than the matter for discussion reasonably requires.

Section 3—Business Representatives and Union Officials
The Business Representatives of the Union shall have access to the Company's plants or to the departments of the Company's plants to which they are assigned, for the purpose of contacting Union Chairmen. Such visits shall be subject to such regulations as may be made from time to time by the Company, the U. S. Army, and the U. S. Navy. The Company shall not impose regulations which will exclude the Business Representatives from the plants nor render ineffective the intent of this provision.

No full-time Union official or Business Representative shall discuss any problem with employees (other than Chairmen) or with the supervision of any department, except as provided in Article III of the Agreement. [54]

Section 4—Cooperation

The Union and its members agree to report to the Company any acts of sabotage, subversive activities, theft, damage to or taking of any employee's, Company's and/or Government's property or work in process or materials, or any known threat of sabotage, subversive activities, or damage to or taking of such property, and the Union further agrees if any such acts occur to use its best efforts in assisting the Company and the Government to determine and apprehend the guilty party or parties.

Section 5—Bulletin Boards and Posting Notices

Space shall be provided on Company property at locations agreed upon for Union bulletin boards for the posting of the following types of notices:

- (1) Notices of Union recreational and social affairs;
- (2) Notices of Union elections;
- (3) Notices of Union appointments and results of Union elections;
- (4) Notices of Union meetings;
- (5) Such other notices as may be mutually agreed upon by the Union and the Company.

The number of bulletin boards shall be governed by past practice.

Section 6—Solicitation of Memberships

Employees and Union Representatives shall not solicit union memberships or collect dues on Company property on the Company time of any employee, although such activities may be conducted by employees on Company property on the free time of the employees.

Section 7—Reports

The Union and the Company may request the following reports which are to be furnished as soon as possible; such requests shall be made only by the President or the Financial Secretary of the Union and the Director of Industrial Relations of the Company:

- (1) Upon the request of the Company, the Union shall certify to the Company the number of its members.

(2) Upon the request of the Union, the Company shall certify to the Union, the number of employees [55] that are in the various occupational classifications recognized by this Agreement.

(3) Upon the request of the Union, the Company shall furnish the Union with lists of employees in their respective departments showing rates, classifications, and date of hiring and shifts.

(4) Upon hiring a new employee, the Company shall mail a copy of the hiring notice to the main Union Office at 5501 Lankershim Blvd., North Hollywood, within twenty-four (24) hours of the commencement of his employment.

ARTICLE III

GRIEVANCE PROCEDURE AND ARBITRATION

Section 1—Department Representation

Complaints arising out of employment shall, whenever possible, be concluded within the department by the cooperation of the Union Chairman and the supervisory staff. In order to accomplish this cooperative action the Department Head shall set aside a portion of one day per week to discuss with the Senior Chairman written grievances of employees which have been on file for not less than three working days and any problems arising regarding rates of pay, hours, and working conditions and the provisions of this Agreement. The Department Head shall set aside a portion of an additional day per week to discuss with the Senior Chairman written grievances of employees which have been on file for not less than three working days.

The days on which the Senior Chairman meets with the Department Head shall not be consecutive and shall not be longer apart than three working days.

Section 2—Method of Handling Grievances

An employee may first present his complaint to his Department Head, either in person or through his Union Chairman. However, if the employee so desires he may deliver a written grievance to his Senior Chairman and proceed in accordance with Step 1 of the grievance procedure.

The procedure on grievances shall be as follows:

Step 1. The employee shall state his grievance in writing on a form to be mutually agreed upon by the [56] Company and the Union and shall sign such grievance. The employee's Senior Chairman shall deliver such grievance to the Department Head and at the time of one of the regular meetings between the Department Head and the Senior Chairman an attempt shall be made to settle the grievance. However, if extremely urgent an attempt may be made to settle the grievance at the time of its delivery to the Department Head.

Step 2. The grievance may be presented by a Business Representative or an officer of the Union to the Industrial Relations Office of the Company and an attempt shall be made to settle the grievance.

Step 3. The grievance may be presented to the Labor Relations Subcommittee in accordance with the provisions of Section 3 of this Article and the Subcommittee shall attempt to settle the grievance.

Step 4. The grievance may be presented to the Labor Relations Committee and the Committee shall attempt to settle the grievance.

Step 5. The grievance may be presented to an arbitrator as provided in Section 5 of this Article.

The Company shall not confer with an employee with respect to a written grievance filed by him unless the employee's Senior Chairman has been notified and given an opportunity to be present.

The Union may file with the Industrial Relations Office of the Company written grievances, other than individual employee grievances, on a form to be mutually agreed upon by the Company and the Union with respect to any matter involving the interpretation or application of this Agreement. On such grievances Steps 1 and 3 shall be omitted and such grievances shall proceed as provided in Steps 2 and 4.

Grievances shall be filed promptly after the occurrence of the subject matter of the grievance. Matters occurring more than sixty (60) calendar days prior to the filing of a written grievance (fifteen (15) days on discharge, layoff and rehiring cases) shall not be made the subject matter of a grievance. Such time limit shall be extended where the delay in filing the grievance was due to the excusable neglect of the grieving employee or the Union. [57]

Grievances shall be promptly decided in each Step and if the aggrieved party desires to proceed to the next Step, such action shall be taken promptly. Grievances shall be deemed to be settled unless within fifteen (15) calendar days of the decision upon the grievance in any Step, the grieving party or the Union shall give written notice of

intent to proceed to the next Step. Such time limit shall be extended where the delay in proceeding to the next Step is due to the excusable neglect of the grieving employee or the Union.

Failure of the Company and the Union to reach a decision within six (6) working days in Step 1 and within fifteen (15) days in Step 2 shall entitle the grieving party to give written notice of intent to proceed to the next Step.

Section 3—Labor Relations Subcommittee

There shall be established a Labor Relations Subcommittee. The Subcommittee shall consist of four (4) members of the Union and four (4) representatives of the Company. The Subcommittee shall meet once each week except where no grievances are pending, and will handle all employee grievances which have proceeded through the previous steps of the grievance procedure without a settlement having been made.

The agenda for each meeting shall schedule those grievances on which written notice has been received by the Industrial Relations Office at least three (3) regular working days prior to the time of the meeting. Special meetings of the Subcommittee may be called by mutual consent. Any meeting may be cancelled or postponed with the mutual consent of the Union and the Industrial Relations Office of the Company.

Section 4—Labor Relations Committee

A Labor Relations Committee is hereby established which shall consist of representatives of the Union and the Company. The representatives of the Union shall consist of a board of five (5) elected members and the President and another official of the Union. The repre-

representatives of the Company shall consist of a like number to be chosen in such manner as the Company may desire. This committee may establish subcommittees on a permanent or temporary basis. [58]

The Labor Relations Committee shall review and attempt to settle all grievances which shall remain unsettled after the procedure set forth in Sections 2 and 3 of this Article has been followed.

The decisions of the Labor Relations Committee shall be considered as final if a majority of the Union representatives and a majority of the Company representatives concur. If the committee fails to adjust a grievance either party may proceed as set forth in Section 5 of this Article.

A meeting of this Committee may be called by the Union or the Company to be held at a mutually agreeable date upon not less than three days' written notice served upon the other, provided, however, that such meeting shall be held within one week from receipt of such notice and that except by mutual consent no more than one meeting per week shall be held. Such notice shall specify the matters desired to be discussed at the meeting.

Section 5—Arbitration

Any grievance which has not been settled pursuant to Sections 2 through 4 of this Article and which involves the interpretation or application of this Agreement may be referred to arbitration. The Union shall deliver to the Company a written notice to that effect, including a statement of the issue to be arbitrated and the parties shall then by mutual agreement select an arbitrator.

Such arbitrator shall be paid by the parties hereto, and the expense of the arbitration shall be divided equally.

The arbitrator shall have the authority to interpret and apply the provisions of this Agreement, but shall not have authority to amend or modify this Agreement or to establish new terms and conditions of this Agreement.

There shall be no stoppage of work on account of any controversy which may be made the subject of arbitration, and the decision of the arbitrator shall be final and binding upon the Company, the Union and the employee, subject to the approval of the National War Labor Board where such approval is required. [59]

ARTICLE IV

SENIORITY

Section 1—Basis of Seniority

Seniority shall be the relative status of employees in respect of length of service with the Company, subject to the following qualifications:

(1) An employee hired to work at a plant outside the Los Angeles Metropolitan Area and remaining **there** or transferring from such plant to some other outlying plant, shall have seniority only at the outlying plant where he is working, dating from his original hire or rehire by the Company. A training period within the Los Angeles Metropolitan Area for service elsewhere shall not be considered as service in the Metropolitan Area. Pomona shall not be considered a part of the Metropolitan Area.

(2) An employee hired within the Los Angeles Metropolitan Area, or transferred to such area to work within it, shall have seniority within the Los Angeles Metropolitan Area dating from his original hire or rehire by the Company. In addition, if such

employee is thereafter transferred to an outlying plant, he shall also have seniority at the outlying plant where he is working dating from his original hire or rehire by the Company.

(3) An employee heretofore or hereafter transferred from an occupation covered by this Agreement to a salaried occupation shall continue to accumulate seniority, and in case of transfer to an occupation covered by this Agreement such seniority shall apply.

(4) An employee heretofore or hereafter transferred from an occupation covered by this Agreement to an hourly paid occupation not covered by this Agreement shall continue to accumulate seniority, and in case of subsequent transfer to an occupation covered by this Agreement such seniority shall apply. An employee hired within an hourly paid occupation not covered by this Agreement and thereafter transferred into an occupation covered by this Agreement, shall have seniority dating from his original hire or rehire by the Company. [60]

(5) Employees originally hired into the bargaining unit as set forth in the Agreement who left the Company to accept employment with Lockheed Overseas Corporation shall upon termination of their employment with Lockheed Overseas Corporation, be allowed immediately to return to employment with the Company with accumulated seniority.

(6) A part-time employee shall be entitled to credit for length of service in the same proportion that time regularly worked by such part-time employee bears to the time regularly worked by a full-

time employee except for purposes of layoff and re-hiring after a layoff.

For purposes of layoff, part-time employees shall not be considered to have acquired seniority.

Section 2—Establishment of Seniority Rights

Three months after an employee starts to work he shall acquire seniority rights and his seniority shall be retro-active to his starting date.

Section 3—Layoffs

(A) General Layoff Procedure. Layoffs shall be made in order of Company-wide seniority applied by occupation where ability, skill and efficiency are substantially equal. However, in the case of employees with four years' or more seniority, the Company may, in its discretion, retain them in order of their Company-wide seniority, regardless of occupation, where ability, skill and efficiency are substantially equal. Any claim of unjust discrimination in the exercise of such discretion may be taken up as a grievance. Employees who have not acquired seniority rights may be laid off without regard to relative length of service.

The word "occupation" as used herein, includes all grades and leadmen within an occupation.

(B) Temporary Layoffs. Temporary layoffs may be made for periods not exceeding fifteen (15) working days. Such layoffs shall be made in order of Company-wide seniority applied by occupation within the particular unit of organization, work unit or project affected where ability, skill and efficiency are substantially equal.

The word "occupation" as used herein includes all grades and leadmen within an occupation. [61]

(C) Emergency Reduction of the Working Force.

Step 1. When an emergency reduction of the working force is necessary, such as is occasioned by the cancellation of any contracts in whole or in part, the first step in the Emergency Reduction of the Working Force shall be the layoff of employees affected, without regard to the General Layoff Procedure, for the period of time necessary to put into effect Step 2.

Step 2. The second step of the Emergency Reduction of the Working Force shall be the carrying out of the General Layoff Procedure. Such assignments shall not be governed by the Rehiring Procedure and shall be made as promptly as is reasonably possible.

(D) Top Seniority for Union Chairmen for Purpose of Layoffs. For the purpose of applying the Temporary and General Layoff Procedures, Union Chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain Chairmen. If the application of the General Layoff Procedure will result in the retention of more of such Chairmen in a group or department than are provided for in Article II, Section 2 of this Agreement, the Company shall prepare and furnish to the Union a list of all Chairmen in the locations where the surplus exists. The Union shall upon request of the Company promptly designate the Chairmen who are to remain in that capacity and the Chairmen not to be retained as Chairmen shall be governed by the seniority rules applicable to the layoff of other employees. During a Temporary Layoff and during the period between the first and second steps in an Emergency Reduction of the Working Force, the terms of office of laid-off Union Chairmen shall be deemed to continue.

Section 4—Rehiring

Laid-off employees in any occupation shall be rehired in order of Company-wide seniority applied by occupation where ability, skill and efficiency are substantially equal. However, in the case of employees with four years' or more seniority the Company may, in its discretion, rehire them in order of their Company-wide seniority, regardless of occupation where ability, skill and efficiency are substantially equal. Any claim of unjust discrimination [62] in the exercise of such discretion may be taken up as a grievance.

In the event an occupational seniority list is exhausted, the Company will rehire in such occupation, employees in order of Company-wide seniority regardless of occupation where ability, skill and efficiency are substantially equal.

The word "occupation" as used herein includes all grades and leadmen within an occupation.

If because of sickness, injury, or causes beyond his control a laid-off employee fails to report for an interview for work at or before a time specified by the Company on the second working day after the date on which the Company shall have sent a notice by wire or registered mail to such employee at his last address filed with the Company, or at such other date thereafter as the Company may designate, the employee shall not be entitled to the job but shall be entitled to hold his place on the seniority list and to be considered for the next vacancy for which he is eligible. The employee shall be required to furnish evidence of sickness or injury to the satisfaction of the Company's Medical Department.

Section 5—Physically Handicapped Employees

Physically handicapped employees (blind, those who are deaf and dumb, or have similar disabilities) may be retained or rehired regardless of the seniority principles stated in this Article in accordance with such mutual agreement as hereafter may be entered into between the Company and the Union.

Section 6—Employees Entering Armed Forces

Employees (other than temporary employees) who shall have left the employment of the Company for the purpose of entering the armed forces of the United States, shall be re-employed by the Company in accordance with the provisions of the Selective Training and Service Act of 1940, as such Act may be amended.

Section 7—Information to be furnished to the Union

(1) On General Layoff Procedure the Company will furnish the following:

(a) At the time of the application of the General Layoff Procedure, a copy of the seniority roster used [63] by the Company in applying such procedure; such seniority roster will list employees in the affected occupation in order of their seniority.

(b) Seniority roster by occupation of all laid-off employees as of a date immediately after the application of the General Layoff Procedure.

(c) In so far as is practicable, prior to the date of the layoff, the anticipated date, the approximate size and the probable occupations affected.

(2) On an emergency reduction of the working force the Company will furnish the Union the following after adjustments have been made in accordance with the General Layoff Procedure:

(a) Seniority roster by occupation of employees in the service of the Company in the occupations affected as of a date immediately preceding the adjustments;

(b) Seniority roster by occupation of employees in the service of the Company in the occupations affected as of a date immediately after the adjustments;

(c) Seniority roster by occupation of all laid-off employees as of a date immediately after the application of the General Layoff Procedure.

(3) The Company will furnish the Union a monthly list of employees dropped from lists (1)(b) and (2)(c) by reason of loss of seniority.

Section 8—Loss of Seniority

An employee shall lose his seniority upon the happening of any one of the following events:

(1) Resignation (a five-day unreported absence without a reasonable explanation shall be considered a resignation);

(2) Discharge for just cause;

(3) If, after a layoff, the employee is notified to report for an interview for work, by registered mail, or telegram, addressed to him at the last address filed by him with the Company, and fails within one (1) week after notification or such additional time as the Company may

grant either to report for an interview or to deliver to the Company a reasonable excuse for failure to report; [64]

(4) Failure, after an interview, to report for work at the time designated by the Company or to furnish to the Company a reasonable excuse for failure to report;

(5) Failure to give written notice of his availability for employment together with his then current address delivered by registered mail, telegram, or in person to the Industrial Relations Office of the Company every thirty (30) days after a layoff or to furnish, within one (1) week after the expiration of the thirty-day period, a reasonable excuse for failure to give such written notice;

(6) Layoff for a period of twelve (12) consecutive months. If the Company should, within six (6) months after the expiration of twelve (12) consecutive months following a layoff, rehire an employee who had acquired seniority, such employee shall be credited with the seniority he held at the expiration of such twelve-month period.

Section 9—Promotion and Upgrading

On promotion to higher rated jobs within the bargaining unit, and on upgrading from lower grades to higher grades in the same occupation, consideration shall first be given to those employees within the smallest unit under full-time supervision where the opening exists; then within the department; then within the division; then within the branch; then within the Company.

In selecting an employee for such promotion or upgrading to an available opening the following standards shall apply:

(1) Availability for release—Production requirements will be considered insofar as they pertain to the release of an employee from his present job. In general the release of an employee for promotion or upgrading will be granted unless it is determined by supervision at the office level that, because of production requirements, the employee cannot be released.

(2) Where ability, skill and efficiency are substantially equal, preference shall be given to the most senior qualified employee within the applicable unit.

(3) The fact that an employee has been at the maximum rate of his grade for sixteen (16) weeks shall be given full consideration.

(4) Employee preference as indicated by employee [65] written requests filed with the Company shall be given full consideration.

Section 10—Transfers

Transfers shall be made on the basis of operational requirements of the Company. On transfers to vacancies, consideration will be given to employees who have filed written requests with the Company and, subject to operational requirements, such requests will be considered on the basis of seniority where ability, skill and experience are substantially equal. Such consideration will be given first to such employees within a department; then within the division; then within the branch; then within the Company. The word "transfers" as used herein does not apply to promotions to higher rated jobs; to upgrading from lower grades to higher grades in an occupation or to downgrading to lower rated jobs.

Section 11—Downgrading

Employees may be downgraded to lower rated jobs only for the following reasons:

(1) For unsatisfactory performance on the employee's present job.

(2) In the event continued performance of employee's present job will injure the health of the employee.

(3) In the event there are changes in production methods, production schedules or changes in the method of doing the job, which either eliminate or materially change the work performed by the employee to such an extent that the majority of the work performed by, or assigned to the employee, falls within the job description of a lower rated job.

(4) The National Labor Board Directive Order of September 20, 1945 (Case No. 111-16460-D) provides as follows:

"In the event an employee is not properly classified in accordance with the job description in effect. However, any employee who has been classified in his present job for 16 weeks or longer shall be conclusively presumed to be receiving the proper rate. The Company shall not downgrade him except in accordance with one of the other subdivisions of this section. The Company shall be permitted, however, upon proof that the employee is mis-[66] classified, to reclassify him in another job at a rate no lower than that which he presently receives. In that event, the employee shall receive at least 10 days' notice of such reclassification. If the employee contests the Company's finding that he has been misclassified, he may file a grievance."

The employee shall be notified at or before the time of his assignment to a lower rated job of the date on which his change in rate and classification are to be made effective. At the time of such notification, he shall be permitted to file with the Company a written request for transfer.

Downgrading from a higher grade to a lower grade within an occupation into vacancies caused by the laying off of employees, shall be made within the employee's department on the basis of seniority where ability, skill and efficiency are substantially equal. If the Company should transfer an employee to another department and then downgrade him, such downgrading shall be made in that department in accordance with the principles in this paragraph.

When management deems its necessary in the interest of production efficiency to temporarily (less than three months) assign employees to work on lower rated jobs, no change in classification or pay rate shall be effected. When management deems it necessary to assign employees either temporarily or permanently to lower rated jobs, management will at the time of change notify the employees of the nature of the change and whether it is temporary or permanent. In the event such temporary assignment exceeds three (3) months, said lower rated job shall be considered a vacancy and be filled accordingly.

ARTICLE V

EMPLOYMENT CONDITIONS

Section 1—Sanitary, Safety and Health Conditions

The Company agrees to maintain sanitary, safe and healthful conditions in all its plants and working establishments in accordance with the laws of the State, County

and City of its place of operation. Proper and modern safety devices shall be provided for all employees [67] working on hazardous or unsanitary work, such devices (except articles of clothing) to be furnished by the Company. No employee shall be discharged for refusing to work on a job not made reasonably safe or sanitary for him, or that might unduly endanger his health.

All recommendations and grievances concerning sanitation, safety, health and other working condition factors will be presented through the procedure set forth in Article III.

One member of each of the Company's General Safety Committees shall be elected by the Union.

Section 2—Hiring Age

The Company agrees that there shall be no established maximum age limit in the hiring of employees.

Section 3—Employment Not Jeopardized

Union membership or legitimate Union activity will not jeopardize an employee's standing with the Company or opportunity for advancement.

Section 4—Educational Facilities

The Company shall continue to cooperate with the Union's Educational Committee to make certain educational facilities available to its employees, in order that they may receive training to qualify them for work in more than one department in the plants, if they so desire.

ARTICLE VI

EMPLOYEE PRIVILEGES

Section 1—Vacations

(A) Vacation Service and Privileges of an Employee on the Active Pay Roll of the Company:

(1) An employee with less than five (5) years' seniority on his vacation eligibility date shall be entitled to one (1) week's vacation with pay. In addition thereto each such employee who has not used all of his sick and injury leave during the year of service preceding his vacation eligibility date shall, at his option, be entitled to one additional week's vacation, with pay for such unused sick and injury leave, or to pay for such unused sick and injury leave without an additional week's vacation. [68]

(2) An employee with five (5) years' or more seniority on his vacation eligibility date shall be entitled to two (2) weeks' vacation with pay.

(3) An employee's vacation eligibility date occurs upon the first day of the month in which he will have accumulated one year of service subsequent to his last vacation eligibility date or, in case of an employee's first vacation, subsequent to the date when he started to work.

(4) Pay for a week's vacation for a full-time employee shall be construed as follows:

(a) If, at the time of an employee's vacation eligibility date, a majority of the employees in the plant in which he is employed are regularly scheduled to work in excess of five (5) standard daily shifts per week, pay for one week's vaca-

tion means pay for forty-eight (48) hours at the employee's regular base rate of pay on such eligibility date.

(b) If, at the time of an employee's vacation eligibility date, a majority of the employees in the plant in which he is employed are regularly scheduled to work five (5) standard daily shifts per week, pay for one week's vacation means pay for forty (40) hours at the employee's regular base rate of pay on such eligibility date.

(c) An employee's regular base rate of pay does not include overtime, shift bonus, or any other premium.

(5) Pay for unused sick and injury leave shall be construed as an amount equal to the hours of unused sick and injury leave times the employee's base rate of pay at his vacation eligibility date.

(6) Pay for the vacation of an employee who is a part-time employee as of his vacation eligibility date shall be proportionately reduced. For example, an employee who is regularly scheduled to work six (6) days per week, four (4) hours each day, will be entitled to one (1) week's vacation with pay for twenty-four (24) hours at the employee's base rate of pay. [69]

(B) Vacation Service and Privileges of an Employee Who Terminates, or is Terminated, Laid-Off or on Leave of Absence:

(1) An employee who has become entitled to a vacation with pay and who hereafter terminates or is terminated or laid off prior to the taking of his vacation shall receive such pay as he is entitled to

under the provisions of subdivisions (A) (1) or (A) (2) of this Section.

(2) Until the termination of the period of the Unlimited National Emergency proclaimed by the President of the United States, or until the National War Labor Board's Directive Order of March 3, 1943. In the Matter of the West Coast Airframe Companies, as heretofore or hereafter amended, has been terminated or has ceased to be effective, the following employees shall be paid pro rata vacation pay for a portion of a year of service:

(a) An employee who has become eligible for a vacation and who, prior to his next vacation eligibility date, is laid off under such circumstances that the Company anticipates that the layoff will last more than ninety (90) days or if the layoff lasts more than ninety (90) days and the employee makes written request for such payment.

(b) An employee who shall have terminated his employment on or after March 3, 1943, in order to enter the armed forces, regardless of whether he shall have then become entitled to his first vacation.

(3) After the termination of said Unlimited National Emergency, or after said Directive Order of the National War Labor Board has been terminated, or has ceased to be effective, no prorated vacation allowance shall be paid to any employee.

(4) For the purpose of acquiring vacation privileges, an employee shall be credited with all service

accumulated up to the time of his termination, layoff or leave of absence provided:

(a) He returns to work for the Company after the period of such termination, layoff or leave of absence; and [70]

(b) He retains his seniority rights with the Company during such period; and

(c) He was not paid a prorated vacation allowance.

(5) Time spent by an employee during a period when he is severed from the active payroll due to termination, layoff or leave of absence shall not constitute service time for the purpose of acquiring vacation privileges; provided, however, that time lost, not to exceed six (6) months, due to occupational injury or occupational illness shall be counted for the purpose of computing service time if the employee returns to the active payroll of the Company.

(C) Transition from Existing Vacation Plan in Respect to Certain Employees Hired Prior to March 1, 1941:

(1) The vacation eligibility date of an employee hired prior to March 1, 1941, who has less than five (5) years' seniority at the time this Section shall have become effective and who shall reach the fifth anniversary of his seniority date prior to March 1, 1946, shall be the first day of the month in which such fifth seniority anniversary date occurs.

(2) On such vacation eligibility date, such employee shall be entitled to the vacation privileges established in subdivision (A) (2) of this Section. Thereafter, his vacation eligibility date shall be as provided in subdivision (A) (3) of this Section.

(D) Scheduling of Vacations:

(1) Vacations shall not be cumulated from one year to another but must be taken within twelve months after the eligibility date except that one vacation shall not be taken within two months of the next vacation.

(2) Vacations shall be taken when they interfere least with production. So far as is practicable vacation time preference will be given to employees with the greatest seniority.

(E) Prior Service Time:

This Section shall be applicable to all employees who become eligible for vacation privileges subsequent to the date of approval of the Section by the National War Labor Board.* Service time prior to the date of [71] such approval shall count toward an employee's vacation eligibility date.

(F) Effective Date:

This Section is subject to the approval of the National War Labor Board and shall become effective upon such approval.*

*Approved June 8, 1945.

Section 2—Sick and Injury Leave

(A) Sick and Injury Leave Benefits of an Employee on the Active Pay Roll:

(1) In the event of an employee's occupational or non-occupational sickness or injury, or in the event of his absence because of death in his immediate family, such employee shall be entitled to a total of six (6) days' sick and injury leave with pay during each year of his service. Such leave shall not exceed three (3) days at any one time. No sick and injury leave shall be paid for part-day absences. An employee shall not be entitled to use his sick and injury leave until after he has completed twelve (12) weeks' continuous service from the date when he starts to work.

(2) A full-time employee means an employee who is regularly scheduled to work five or more standard daily shifts per week.

(3) Pay for one day's sick and injury leave for a full-time employee means pay for eight (8) hours at the employee's regular base rate of pay. An employee's regular base rate of pay does not include overtime, shift bonus, or any other premium.

(4) Pay for sick and injury leave of a part-time employee shall be proportionately reduced.

(B) Sick and Injury Leave Benefits of an Employee Who Terminates or is Terminated, Laid Off or on Leave of Absence:

(1) Service time of an employee shall be accumulated toward his year of service regardless of termination, layoff or leave of absence provided:

(a) He returns to work for the Company after the [72] period of such termination, layoff or leave of absence; and

(b) He retains his seniority rights with the Company during such period; and

(c) He was not paid a prorated vacation allowance.

(2) Time spent by an employee during a period when he is severed from the active pay roll due to termination, layoff or leave of absence shall not constitute service time for the purpose of acquiring sick and injury leave benefits; provided, however, that time lost, not to exceed six (6) months, due to occupational injury or occupational illness shall be counted for the purpose of computing service time if the employee returns to the active pay roll of the Company.

(3) Termination, layoff or leave of absence shall not entitle an employee to be paid any pro rata allowance for unused sick and injury leave for a portion of a year of service.

(C) Verification and Notification:

All sick and injury leave is subject to verification by the Company's Medical Division. An employee shall notify the Company within twenty-four (24) hours of his illness or injury or death in his immediate family requiring his absence from work or furnish a reasonable excuse for failure to notify the Company.

(D) Prolonged Disability:

An employee shall not be terminated by the Company because of a prolonged continuous illness or injury provided the period of disability is not longer than six (6) months and, upon being pronounced physically and mentally fit by the Company, shall be reinstated to the same or substantially equivalent job if such job is available to him in accordance with his seniority rights.

Prior Service Time:

Service time prior to the date of approval of this Section by the National War Labor Board* shall count toward an employee's year of service.

Effective Date:

This Section is subject to the approval of the National War Labor Board and shall become effective upon such approval.* [73]

Section 3—Holidays

(1) The Company recognizes the following six (6) legal holidays: New Year's Day; Memorial Day; Fourth of July; Labor Day; Thanksgiving Day; and Christmas Day.

(2) Full pay (eight (8) hours at straight time) shall be paid to all employees whenever one of these holidays falls on Monday through Friday or on Saturday if the work schedule of the majority of employees includes Saturdays. In addition, straight time shall be paid for hours worked on holidays up to eight (8) hours; thereafter two times the regular rate shall be paid.

*Approved June 8, 1945.

(a) He returns to work for the Company after the [72] period of such termination, layoff or leave of absence; and

(b) He retains his seniority rights with the Company during such period; and

(c) He was not paid a prorated vacation allowance.

(2) Time spent by an employee during a period when he is severed from the active pay roll due to termination, layoff or leave of absence shall not constitute service time for the purpose of acquiring sick and injury leave benefits; provided, however, that time lost, not to exceed six (6) months, due to occupational injury or occupational illness shall be counted for the purpose of computing service time if the employee returns to the active pay roll of the Company.

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An employee shall not be terminated by the Company because of a prolonged continuous illness or injury provided the period of disability is not longer than six (6) months and, upon being pronounced physically and mentally fit by the Company, shall be reinstated to the same or substantially equivalent job if such job is available to him in accordance with his seniority rights.

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(2) Full pay (eight (8) hours at straight time) shall be paid to all employees whenever one of these holidays falls on Monday through Friday or on Saturday if the work schedule of the majority of employees includes Saturdays. In addition, straight time shall be paid for hours worked on holidays up to eight (8) hours; thereafter two times the regular rate shall be paid.

*Approved June 8, 1945.

(3) In order to be eligible for holiday pay, an employee must have worked or have been on a vacation or a paid leave (other than paid sick leave) on the day before or the day after the holiday; except that when the holiday falls on the day before employment or the day after termination, or during an employee's vacation or leave, no pay under this Section shall be granted.

(4) Should a recognized holiday fall upon a Sunday, the Monday immediately following shall be observed as the holiday.

(5) During such period as pay for holidays is restricted by Executive Order 9240,** or other law or regulation, the premium pay rate for hours worked on any of said holidays, as provided in Subdivision (2) of this Section, shall be one and one-half times the employee's regular rate of pay.

Section 4—Leaves Without Pay

Leaves of absence without pay may be granted employees for a period not to exceed ten (10) working days during the year. For good and sufficient reason the Company may extend the period of the leave. The leave of absence shall not in any way jeopardize the employee's standing with the Company.

On all leaves of absence of ninety (90) calendar days or less, an employee shall accumulate seniority. On leaves of absence exceeding ninety (90) calendar days, seniority shall accumulate after ninety (90) days only if specified by the terms of the leave; provided, however, that on leaves of absence heretofore or hereafter granted for [74] Union business of Lodge 727, the employee shall accumulate seniority during such leaves.

**Executive Order 9240 was revoked August 21, 1945.

The Union may request, and the Company will grant, leaves of absence of three (3) days or more without pay, to Union members for Union business of Lodge 727 and excused absences of less than three (3) days without pay to Union members for Union business of Lodge 727. Such leaves and excused absences will be requested only in reasonable numbers and at reasonable times upon twenty-four (24) hours' written notice to the Company except when such notice is waived by mutual agreement.

ARTICLE VII

PAY PROVISIONS

Section 1—Periodic and Special Reviews

The rate and record of each employee shall be reviewed every sixteen weeks with a view to wage adjustment in accord with his proven ability, production, etc. This periodic review is not to be construed to mean that any employee is guaranteed an increase as a result of this review.

Periodic reviews of employees shall be administered in such a way as to allow the Union to represent the employee at the time of his review. Any such review that is not satisfactorily concluded automatically goes to Step 2 of the grievance procedure.

A special review for any employee shall be made in the event of a change of work or other condition which may warrant such special review.

Section 2—Overtime Pay

(1) Hours worked in excess of eight (8) hours in any one day of an employee's work week shall be paid for at one and one-half times the regular rate of the employee.

(2) During such period as overtime pay is restricted by Executive Order 9240* or other law or regulation, the following provisions shall be applicable:

(a) For purposes of computing overtime pay, the work week shall consist of seven (7) consecutive days commencing on Monday of each calendar week and ending on the following Sunday.

(b) An employee shall be paid time and one-half his regular rate of pay for work performed on his sixth day worked in the [75] work week, and two times his regular rate of pay for work performed on his seventh day worked in the work week.

(c) In computing the sixth day worked in the work week, days upon which an employee works any portion of the day shall be counted as days worked.

(d) In computing the sixth day worked in the work week, days upon which an employee is absent the full day for any reason shall not be counted as days worked, except:

1. Designated holidays on which no work is performed.
2. Days on which an employee reports with the reasonable expectation of work and is sent home because of a lack of work or other reason beyond his control.
3. Paid vacation days.
4. Paid days of service as an election officer at a federal, state or municipal election.
5. Days upon which certain Union officers and committeemen are absent for certain purposes, such officers and committeemen and purposes to be mutually agreed upon by the Company and the Union.

*Executive Order 9240 was revoked August 21, 1945.

(e) In computing the seventh day worked in the work week, days upon which an employee is absent for part of the day without justifiable reason shall not be counted as days worked; provided, however, that it shall be permissible for the employee to make up the time lost by such voluntary absence by work on the seventh day of the work week and to be compensated at the rate of double time for those hours worked on such seventh day after the time lost has been made up. "Justifiable reasons" for part day absences under this Section are as follows:

1. Illness or injury of the employee;
2. Critical illness or death in the immediate family of the employee;
3. Required appearance before Draft Board for Selective Service business;
4. Authorized Union Business, cleared through the Industrial Relations Office of the Company;
5. Compulsory witness or jury duties;
6. Service as an election officer at a federal, state or municipal election;
7. Leaving work at Company direction.

(f) In computing the seventh day worked in the work week, days upon which an employee is absent the full day for any reason shall not be counted as days worked, except designated holidays on which no work is performed and days on which an employee reports with the reasonable expectation of work and is sent home because of a lack of work or other reason beyond his control.

(g) An employee shall not receive overtime pay for work on Saturday or Sunday or any particular day of the work week as such.

(3) In the absence of restrictions on overtime pay under [76] Executive Order 9240* or other law or regulation, the following provisions shall be applicable:

(a) Each employee whose regular day off in his regularly scheduled work week is Sunday shall be paid time and one-half his regular rate of pay for work on Saturdays and two times his regular rate of pay for work on Sundays.

(b) Each employee whose regular day off in his regularly scheduled work week is other than Sunday shall be paid time and one-half his regular rate of pay for work on the day preceding his regular day off, and two times his regular rate of pay for work on his regular day off.

Section 3—Hours and Days of Work

(1) For all employees eight (8) hours shall constitute a standard day's work to be performed within nine (9) consecutive hours.

(2) In the factory, the standard day shift shall be from 7:00 a. m. to 3:30 p. m.; the standard night shift shall be from 4:00 p. m. to 12:30 a. m.; and the standard graveyard shift shall be from 12:30 a. m. to 7:00 a. m.

(3) In the office and technical departments, the standard day shift shall be from 8:00 a. m. to 4:45 p. m., or 7:30 a. m. to 4:00 p. m. or 4:15 p. m., except where the nature of the work requires that factory hours be maintained.

(4) An employee commencing his work day between the hours of 4:00 a. m. and 10:59 a. m. is considered to be in the day shift rate period. An employee commencing

*Executive Order 9240 was revoked August 21, 1945.

his work day between the hours of 11:00 a. m. and 8:29 p. m. is considered to be in the night shift rate period. An employee commencing his work day between the hours of 8:30 p. m. and 3:59 a. m. is considered to be in the graveyard shift rate period.

(5) For firemen the standard day shift shall be either 7:00 a. m. to 3:00 p. m. or 8:00 a. m. to 4:00 p. m.; the standard night shift shall be either 3:00 p. m. to 11:00 p. m. or 4:00 p. m. to 12:00 midnight; the standard graveyard shift shall be either 11:00 p. m. to 7:00 a. m. or 12:00 midnight to 8:00 a. m. Variations from such standard shift hours may be established by mutual agreement [77] between the Company and the Union. Firemen shall be on duty during their entire shift period.

(6) All deviations from the standard shift hours shall be cleared with the Union and mutually agreed upon.

(7) Five (5) days, Monday through Friday, shall constitute the standard work week unless or until the Company is instructed by the Federal Government to alter or change the work schedule now in effect. However, the Company reserves the right to engage, alter, or rotate maintenance, personnel service, administrative service, firemen or employees engaged in preparing the pay roll to work five (5) consecutive days other than those constituting the standard work week. It is specifically agreed that these employees will not be engaged in production work. Maintenance employees shall not be assigned to odd work weeks except for the purpose of accomplishing work which cannot, within the reasonable judgment of the Company, be accomplished during the standard work week without interfering with the operation of the Company.

(8) Overtime work shall be voluntary only on Sunday or in case of an odd work week employee, only on his regular day off. Any claim of an employee that he has been required to work unreasonable or excessive overtime may be made the subject of a grievance.

Section 4—Premium for Hours and Days of Work

(1) Night shift employees shall receive a bonus of six (6) cents an hour.

(2) Third shift employees shall receive eight (8) hours' pay plus a six (6) cent an hour bonus for working six and one-half ($6\frac{1}{2}$) hours.

(3) All employees working other than the standard work week shall receive a premium of three (3) cents an hour in addition to other bonuses.

Section 5—Pay Roll Deductions for Union Fees and Dues

The Company will deduct from his wages, and turn over to the Union, the Union initiation fee and dues of each employee who individually and voluntarily authorizes the Company in writing to make such deductions. Such pay roll deductions shall be made in accordance with the following provisions:

(1) Such pay roll deductions shall be made only in [78] accordance with instructions upon authorization cards. Such cards shall be in the size and form presently used subject to change by mutual agreement between the Company and the Union. In order to become effective, the authorization cards shall be delivered by the Union to the Pay Roll Department of the Company.

(2) Deductions for the initiation fee shall be made from the employee's pay check for the first pay period

ending in each month in the amount and from the number of such checks as specified by the employee on the fee deduction authorization card.

(3) Deductions for dues shall be made from the employee's pay check for the first pay period ending in each month in the amount specified by the employee on the dues deduction authorization card. In the event a deduction for dues is not made on one or more consecutive regular pay roll deduction dates due to lack of earnings or insufficient earnings by the employee, then on the next regular pay roll deduction date that the employee has sufficient earnings one double deduction shall be made.

(4)* Cancellation of pay roll deductions for Union dues shall be made in the following manner: The employee shall give notice, in writing, of his or her desire for deductions to stop, and be delivered by him or her to the business office of the Union. The Union shall forward this notice to the Pay Roll Department of the Company.

(5) In order to begin or stop such pay roll deductions, written notice must be received by the Pay Roll Department of the Company at least two weeks prior to the regular pay roll deduction date.

The Company's obligations to make such deductions shall terminate in the event the employee should cease to be an employee as defined in Article I, Section 2 of this Agreement.

*See also: Article I, Section 8—Union Security.

Section 6—Pay Roll Deductions—Company Reimbursement

Pay roll deductions may be made to reimburse the Company as follows:

(1) All costs of tools and equipment issued to an employee but not returned by him, such cost to be subject to wear of the tools.

(2) For each tool check lost and not returned, the sum of twenty-five cents (25c).

(3) For money paid by the Company to a creditor or officer of the law for an indebtedness of an employee, provided demand is made upon the Company according to law.

(4) For any indebtedness due to the Company covering purchases made by an employee through the Company.

(5) For any loans or advances made to the employee by the Company.

(6) For each employee identification card or identification badge lost or destroyed, a sum of one dollar (\$1.00).

(7) For a lost key, a sum of one dollar (\$1.00).

Section 7—Report Time

An employee called to work shall receive a minimum of four (4) hours' pay in the shift to which he is called.

Section 8—Pay Period

Pay checks to employees shall be issued within eight (8) days after the end of the pay period and shall represent the earnings of the employee from Monday to and including Sunday of such pay period.

Section 9—Lost Time

Deductions for time off, whether due to tardiness or other causes, shall be at the rate of one-tenth of an hour's pay for each tenth of an hour or fraction thereof lost from work.

ARTICLE VIII

PAY RATES

Section 1—National War Labor Board Directive Order

The National War Labor Board Directive Order of March 3, 1943, as heretofore or hereafter amended shall govern the relations between the parties. In applying the grievance and arbitration procedure, such Directive Order shall be considered a part of this Agreement. If such Directive Order should be terminated or cease to be effective, its provisions shall continue to govern the relations between the parties until this Agreement is modified, amended or terminated. [80]

Section 2—Pay for Leadmen

Leadmen shall be paid six (6) cents an hour more than the highest paid employee in the group led.

Section 3—Job Descriptions and Evaluations and Wage Rate Schedules

The National War Labor Board Directive Order of September 27, 1945 (Case No. 111-16460-D) provides as follows:

"The Company and the Union, as promptly as possible, shall restudy and rewrite all job descriptions currently in effect within the bargaining unit or which become effective during the terms of this agreement.

"Each job shall be evaluated in accordance with an evaluation plan which is to be mutually agreed upon by the Union and the Company. Wage rates established, based upon the mutually agreed upon evaluations, shall be subject to the approval of any Federal agency then having jurisdiction thereover."

Dated this 4th day of June, 1945.

Aeronautical Industrial District Lodge 727 of Burbank

By Thomas E. McNett President

John P. Cooney Wm. C. Martin Frank J. Keefe
Gary Garrett C. O. McEfee William Phillips
International Association of Machinists

By Roy M. Brown Vice President
Lockheed Aircraft Corporation

By Robert E. Gross President

Courtlandt S. Gross Vice President & General Manager

Cyril Chappellet Vice President

William W. Aulepp Director, Industrial Relations [81]

* * * * *

[Endorsed]: Filed Nov. 27, 1946. Edmund L. Smith, Clerk.

[Title of District Court and Cause]

ANSWER OF RESPONDENT LOCKHEED
AIRCRAFT CORPORATION, A CORPORATION

To the Honorable the Judges of the District Court of the
United States in and for the Southern District of
California, Central Division:

Now comes Lockheed Aircraft Corporation, a corporation, respondent herein, in answering petitioners' petition on file herein admits, denies and alleges as follows:

I.

Answering paragraph IV of said petition on file herein, respondent admits that the petitioners, and each of them, were, upon their application therefor, reemployed and restored to their former positions in the employ of respondent. Other than heretofore admitted, said respondent denies each and every and all of the allegations in the said paragraph IV of petitioners' petition on file herein. [88]

II.

Answering paragraph VIII of said petition on file herein, respondent admits that during the later part of June, 1946, the respondent made a general layoff of field and service mechanics, grade "A", and that in the course thereof, each of the petitioners was laid-off. Respondent further admits that at the time said petitioners, and each of them, were laid-off, as aforesaid, respondent retained in its active employ certain Union chairmen with less

seniority, i. e., "length of service with the Company", than petitioner's. Other than heretofore admitted, respondent denies each and every and all of the allegations in the said paragraph VIII of petitioners' petition on file herein.

III.

Answering paragraph IX of said petition on file herein, respondent admits that the petitioners were laid-off on the respective dates set forth in the said paragraph of said petition, and further admits that the respondent, at the time of said layoff of said petitioners, retained in its active employ in the occupation group in which petitioners were employed certain Union chairmen who had less seniority, i. e., "length of service with the Company", than any of the petitioners. Respondent further admits that the ability, skill and efficiency of the petitioners, and each of them, was substantially equal to that of any of the Union chairmen so retained, and that the layoff of said petitioners, and each of them, as aforesaid, was made on the sole basis of Company-wide seniority and in accordance with the provisions of the collective bargaining agreement then in effect between respondent and Aeronautical Industrial District Lodge #727 of the International Association of Machinists. Other than heretofore admitted, said respondent denies each and every and all of the allegations in the said paragraph IX of petitioners' petition on file herein.

IV.

Answering paragraph X of said petition on file herein, respondent admits that following the aforesaid layoff petitioners Campbell and Joplin were restored to active employment by respondent on July 15, 1946, and that petitioner Kirk was [89] restored to active employment by respondent on July 16, 1946. Other than heretofore admitted, said respondent denies each and every and all of the allegations in the said paragraph X of petitioners' petition on file herein.

Wherefore, Respondent Respectfully prays:

That judgment be entered in favor of said respondent and against said petitioners, denying to said petitioners, and each of them, the relief sought in the said petition or any other relief and awarding to respondent its costs of suit incurred herein.

ROGER B. SMITH

ROBERT H. CANAN

MARK E. TRUE

Attorneys for Respondent

By Mark E. True [90]

[Verified.]

[Endorsed]: Filed Dec. 13, 1946. Edmund L. Smith,
Clerk. [91]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 6028-B Civil

JAMES L. CAMPBELL, MITCHELL B. JOPLIN,
and MALCOLM E. KIRK,

Petitioners,

vs.

LOCKHEED AIRCRAFT CORPORATION, a corpo-
ration,

Respondent,

AERONAUTICAL INDUSTRIAL DISTRICT
LODGE 727, an unincorporated association,

Intervener.

ANSWER OF AERONAUTICAL INDUSTRIAL
DISTRICT LODGE 727

Leave of Court having first been secured, comes now the Aeronautical Industrial District Lodge 727 of the International Association of Machinists, an unincorporated Association, as intervener herein, and in answer to the petitioner's Petition on file herein, admits, denies and alleges, as follows:

I.

Admits all the allegations contained in paragraphs III, IV, V, VI and VII of the Petition.

II.

Answering Paragraph VIII of said Petition on file herein, respondent admits that during the later part of

June, 1946, the respondent made a general layoff of field and service mechanics, [92] grade "A", and that in the course thereof, each of the petitioners was laid off. Respondent further admits that at the time said petitioners and each of them, were laid off, as aforesaid, respondent retained in its active employ certain Union Chairmen with less seniority, i. e., "length of service with the Company", than petitioners'. Other than heretofore admitted, respondent denies each and every and all of the allegations in the said paragraph VIII of petitioners' petition on file herein.

III.

Answering paragraph IX of said Petition on file herein, respondent admits that the petitioners were laid off on the respective dates set forth in said paragraph of said Petition, and further admits that the respondent, at the time of said layoff of said petitioners, retained in its active employ in the occupation group in which petitioners were employed certain Union chairmen who had less seniority, i. e., "length of service with the Company", than any of the petitioners. Respondent further admits that the ability, skill and efficiency of the petitioners, and each of them, was substantially equal to that of any of the Union chairmen so retained, and that the layoff of said petitioners, and each of them, as aforesaid, was made on the sole basis of Company-wide seniority and in accordance with the provisions of the collective bargaining agreement then in effect between respondent and Aero-

nautical Industrial District Lodge #727 of the International Association of Machinists. Other than heretofore admitted, said respondent denies each and every and all of the allegations in the said paragraph IX of petitioners' petition on file herein.

IV.

Answering paragraph X of said Petition on file herein, respondent admits that following the aforesaid layoff, petitioners Campbell and Joplin were restored to active employment by respondent on July 15, 1946, and that petitioner Kirk was restored to active [93] employment by respondent on July 16, 1946. Other than heretofore admitted, said respondent denies each and every and all of the allegations in said paragraph X of petitioners' petition on file herein.

For a Second, Separate, Distinct and Affirmative Defense, this answering defendant in intervention alleges:

I.

That the plaintiff, James L. Campbell, became affiliated with and became a member of the organization of this answering intervener on or about the 2nd day of November, 1942, and terminated his membership therein on or about the 1st day of March, 1946; that the plaintiff, Mitchell B. Joplin, became affiliated with and became a member of the organization of this answering intervener on or about the 18th day of November, 1943, and ever since and has been and still is a member and affiliated with

this answering intervenor; that the plaintiff, Malcolm E. Kirk, became affiliated with and became a member of the organization of this answering intervenor on or about the 12th day of August, 1943 and ever since and has been and still is a member and affiliated with this answering intervenor.

II.

That at all times during which the petitioners were employed by the respondent, Lockheed Aircraft Corporation, the seniority of employees was and is governed and controlled by contractual obligations made and entered into by and between the respondent, Lockheed Aircraft Corporation and this answering intervenor; that copies of the said collective bargaining agreements are attached to the Petition on file herein and are incorporated herein by reference thereto.

III.

That all seniority rights of the petitioners were, and are covered by the aforesaid collective bargaining agreements; that had [94] the petitioners been steadily employed by the respondent, Lockheed Aircraft Corporation at all times mentioned in the Petition and continuously between the respective dates of their original employment and the dates of their respective reemployment, the seniority rights of the petitioners and each of them as of the dates of their respective reemployment, would be fixed and determined by the terms and conditions of the aforesaid agreements by reason of the agreements between

Lockheed Aircraft Corporation and this answering intervener and by reason further of the petitioners being at all times members of this answering intervener.

IV.

That upon reemployment after military service of the petitioners by the respondent, Lockheed Aircraft Corporation, the petitioners, and each of them, were restored to the position of seniority and with all of the rights attendant to their said respective positions of seniority as if the said petitioners had been continuously employed by the said corporation and as the said rights were and would have been as of the dates of their respective reemployment without regard for their respective absence while in military service.

Wherefore, this answering intervener prays that petitioners take nothing by their petition and that the relief sought by the petitioners, and each of them, be denied; that judgment be entered in favor of this answering intervener against the petitioners, and each of them, and for such other and further relief as to the Court may seem meet and just in the premises.

HINDIN, WEISS AND GIRARD

By Maurice J. Hindin

Attorneys for Aeronautical Industrial District
Lodge 727 [95]

[Verified.]

[Endorsed]: Lodged Dec. 17, 1946. Filed Jan. 6, 1947.
Edmund L. Smith, Clerk. [96]

[Title of District Court and Cause]

STIPULATION

Without waiving any objection as to the materiality of any of the facts herein set forth and reserving to each the right to offer any other evidence desired, the parties to this suit, by and through their respective counsels, do hereby stipulate and agree that the following facts are true and correct and that this stipulation may be treated as sufficient proof of the facts herein contained, to-wit:

1. Respondent, Lockheed Aircraft Corporation, now is, and throughout the period covered by the pleadings herein has been, a corporation organized under and pursuant to the laws of the State of California, with its principal place of business at Burbank, California, and respondent now is, and throughout the period covered by the pleadings herein has been, engaged in the manufacture [97] of airplanes.

2. Intervenor, Aeronautical Industrial District Lodge 727 of the International Association of Machinists, now is, and throughout the period covered by the pleadings herein has been, an unincorporated association, and said intervenor now is, and through the period covered by the pleadings herein has been, the duly certified collective bargaining agency which has negotiated with respondent, Lockheed Aircraft Corporation, the agreements attached to and made a part of the complaint on file herein, which said agreements are marked respectively Exhibit "A" and Exhibit "B".

3. Petitioner James L. Campbell became affiliated with and became a member of the organization of intervenor on or about the 2nd day of November, 1942, and ter-

minated his membership therein on or about the 1st day of March, 1946, but this did not affect his status as an employee of the respondent Company.

4. Petitioner Mitchell B. Joplin became affiliated with and became a member of the organization of intervenor on or about the 18th day of November, 1943, and ever since has been and now is a member and affiliated with said intervenor.

5. Petitioner Malcolm E. Kirk became affiliated with and became a member of the organization of intervenor on or about the 12th day of August, 1943, and ever since has been and now is a member and affiliated with said intervenor.

6. Petitioner James L. Campbell was first employed by Vega Aircraft Corporation (which corporation was thereafter merged with and made a part of Lockheed Aircraft Corporation) on August 17, 1942, and continued in the employ of that corporation until February 26, 1944, at which time he terminated said employment in order to perform training and service in the armed forces of the United States under the requirements of the Selective Training and Service Act of 1940. At the time of said termination petitioner Campbell was employed by Lockheed Aircraft Corporation as a Field and Service Mechanic "B" at the rate of pay of \$1.20 per hour. Petitioner Campbell entered the armed forces of the United States on April 10, 1944, and continued in such service until October 28, [98] 1945, on which date he was honorably discharged. Thereafter on November 15, 1945, petitioner Campbell applied to the respondent for re-employment in his former position, and on November 27, 1945, was reemployed and restored to his position as

Field and Service Mechanic "A" in the respondent's employ at the hourly rate of \$1.30.

7. Petitioner Mitchell B. Joplin was first employed by Lockheed Aircraft Corporation on April 19, 1943, and continued in the employ of that corporation until May 28, 1945, at which time he terminated said employment in order to perform training and service in the armed forces of the United States under the requirements of the Selective Training and Service Act of 1940. At the time of said termination, petitioner Joplin was employed by Lockheed Aircraft Corporation as a Field and Service Mechanic "A" at the rate of pay of \$1.50 per hour. Petitioner Joplin entered the armed forces of the United States on June 4, 1945, and continued in such service until November 23, 1945, on which date he was honorably discharged. Thereafter on December 5, 1945, petitioner Joplin applied to the respondent for reemployment in his former position, and on December 10, 1945, was reemployed and restored to his position as Field and Service Mechanic "A" in the respondent's employ at the hourly rate of \$1.50.

8. Petitioner Malcolm E. Kirk was first employed by Vega Aircraft Corporation (which corporation was thereafter merged with and made a part of Lockheed Aircraft Corporation) on August 5, 1942, and continued in the employ of that corporation until May 31, 1944, at which time he terminated said employment in order to perform training and service in the armed forces of the United States under the requirements of the Selective Training and Service Act of 1940. At the time of said termination, petitioner Kirk was employed by Lockheed Aircraft Corporation as a Field and Service Mechanic "B" at the rate of pay of \$1.20 per hour. Petitioner

Kirk entered the armed forces of the United States on June 2, 1944, and continued in such service until January 12, 1946, on which date he was honorably discharged. Thereafter on February 8, 1946, petitioner Kirk applied to the respondent for reemployment in his former position, and on March 7, 1946, was reemployed and restored to his position as Field and Service Mechanic "B" in the respondent's employ at the hourly rate [99] of \$1.44.

9. At the time of the induction of the petitioner, and each of them, into military service there was in effect between respondent and its employees, represented by intervenor, a collective bargaining agreement, dated September 15, 1941, regulating the wages, hours and working conditions of those employees, including petitioners, and each of them, who were represented by intervenor. Said agreement provided in part as follows:

- (a) "This Agreement shall become effective upon its signature and shall remain in force until July 1, 1943, or for the period of the Unlimited National Emergency proclaimed by the President of the United States, whichever is longer, and thereafter until thirty (30) days after either party hereto shall give to the other written notice of desire for change or termination. During such thirty-day period, conferences shall be held by and between the parties hereto with a view to arriving at further agreement. Notices permitted or required to be served under the terms of this Agreement shall be sufficiently served for all purposes herein when mailed postage prepaid, registered mail, return receipt requested, to Robert E. Gross, or his successors, Lockheed Aircraft Corporation, Burbank, California, and/or Courtlandt S. Gross,

or his successor, Vega Aircraft Company, Burbank, California, for service upon the Company, and when similarly mailed to Dale O. Reed, President of the Union, at 147 North Palm Avenue, Burbank, California, or to the successor of him if and when information has been supplied to the Company of the name and address of such successor, and the date of such notice shall be the controlling date for all purposes hereunder." (Article I, Section 3.)

- (b) "This Agreement may be amended or added to at any time by the written consent of both parties hereto. However, after one year from date of the signing of this Agreement, either party may, after fifteen (15) days' written notice, open negotiations only on items directly affecting wage rates and other financial benefits [100] for employees. However, if the national emergency shall have extended beyond July 1, 1943, either party may at that time, after fifteen (15) days' written notice, terminate the Agreement or negotiate amendments on any item of the Agreement. This Agreement shall remain in full force and effect during negotiations on amendments." (Article I, Section 4.)
- (c) "Six months after an employee is hired his seniority shall be retroactive to the date of his hiring. Rehiring is governed by the sections following." (Article III, Section 1.)
- (d) "All employees granted time off or called to duty for United States Government military training, provided such period of training does not exceed sixty (60) days, in any branch of the military

training program, shall receive for a period not to exceed thirty (30) days, the difference between their base military pay and the amount of base pay that would have been earned while working on their regular positions with the Company. This amount will be paid upon return from training and upon receipt of evidence of the amount received while engaged in such training.” (Article IV, Section 5(b).)

- (e) “In case of a slack in production, layoffs are to be made primarily on the basis of the principle of seniority. Due consideration will be given, however, to (a) knowledge, training; ability, skill and efficiency, and (b) department record and other factors. If it becomes necessary to reduce the working force in any plant or department, a plan of layoff procedure will be prepared by the management and submitted to the Union for approval. If such plan is not acceptable to the Union the Company agrees to enter negotiations with the Union and to attempt to arrive at a mutually agreeable plan. If, however, at the end of one working week from the date the Company submitted its original plan of layoff procedure to the Union no new plan has been mutually agreed to, the Company may proceed according to its proposed plan of layoff [101] subject to Article II, Section 6.

“To enable the Union to determine that the principle of seniority and the procedure are adhered to, the Company will provide the Union prior to a layoff with a list of all employees it intends to release.” (Article III, Section 5.)

- (f) "As designated by the Union there shall be in the departments of the plant a department chairman for approximately every 35 to 50 employees and a senior chairman for each department or for every 9 department chairmen or fraction thereof. This shall apply to each shift. Once each year at a time designated by the Union, the Company shall permit all employees to vote on Company property and during working hours for a Union Chairman to serve them for the coming year. The voting shall be conducted under rules and regulations as may be established by the Union subject to the approval of the Company." (Article II, Section 4.)

A copy of said bargaining agreement dated September 15, 1941, is attached hereto, marked Exhibit "A", and is by this reference incorporated herein.

10. On June 4, 1945, and while the petitioners, and each of them, were serving in the armed forces of the United States as aforesaid, respondent and intervenor, on behalf of those employees whom it represented, entered into and executed a collective bargaining agreement. Said agreement of June 4, 1945, provided among other things as follows:

- (a) "Seniority shall be the relative status of employees in respect of length of service with the Company, subject to the following qualifications: . . ." (Article IV, Section 1.)
- (b) "Employees (other than temporary employees) who shall have left the employment of the Company for the purpose of entering the armed forces of the United States, shall be re-employed by the

Company in accordance with the provisions of the Selective Training and Service Act of 1940, as such Act may be amended." (Article IV, Section 6.)

- (c) "General Layoff Procedure. Layoffs shall be made in order of [102] Company-wide seniority applied by occupation where ability, skill and efficiency are substantially equal. However, in the case of employees with four years' or more seniority, the Company may, in its discretion, retain them in order of their Company-wide seniority, regardless of occupation, where ability, skill and efficiency are substantially equal. Any claim of unjust discrimination in the exercise of such discretion may be taken up as a grievance. Employees who have not acquired seniority rights may be laid off without regard to relative length of service. "The word 'occupation' as used herein, includes all grades and leadmen within an occupation." (Article IV, Section 3(A).)
- (d) "As designated by the Union there shall be in the departments of the plant a Group Chairman for approximately every 35 to 50 employees and a Senior Chairman for each department or for every 9 Group Chairmen or fraction thereof. This shall apply to each shift. Once each year at a time designated by the Union, the Company shall permit all employees to vote on Company property and during working hours for Group Chairmen to

serve them for the coming year. The voting shall be conducted under rules and regulations as may be established by the Union subject to the approval of the Company.” (Article II, Section 2.)

- (e) “Top Seniority for Union Chairmen for Purpose of Layoffs. For the purpose of applying the Temporary and General Layoff Procedures, Union Chairmen who have acquired seniority shall be deemed to have top seniority as long as they remain Chairmen. If the application of the General Layoff Procedure will result in the retention of more of such Chairmen in a group or department than are provided for in Article II, Section 2 of this Agreement, the Company shall prepare and furnish to the Union a list of all Chairmen in the locations where the surplus exists. The Union shall upon request of the Company promptly designate the Chairmen who are to remain in that capacity, and the Chairmen not to be retained as Chairmen shall [103] be governed by the seniority rules applicable to the layoff of other employees. During a Temporary Layoff and during the period between the first and second steps in an Emergency Reduction of the Working Force, the terms of office of laid-off Union Chairmen shall be deemed to continue.” (Article IV, Section 3(D).)

A copy of said agreement dated June 4, 1945, is attached hereto, marked Exhibit “B” and is by this reference incorporated herein.

11. Said collective bargaining agreement of June 4, 1945, is now and at all times since June 4, 1945, has been in full effect and operation.

12. During the latter part of June, 1946, and within one year of the reemployment of petitioners, and each of them, respondent made a general layoff of certain Field and Service Mechanics whose employment was covered by the above-mentioned collective bargaining agreement dated June 4, 1945, and in the course of said general lay-off petitioners Campbell and Kirk were laid-off on June 21, 1946, and petitioner Joplin was laid-off on June 24, 1946.

13. At the time the petitioners, and each of them, were laid-off as aforesaid, and throughout the period each of the petitioners was so laid-off, respondent retained in its active employ as a Field and Service Mechanic, F. K. Pierson, a Union Chairman, who was first employed by respondent on, and whose Company seniority with respondent dated from, July 12, 1944, although the ability, skill and efficiency of the petitioners, and each of them, was substantially equal to that of said Union Chairman so retained, and the petitioners, and each of them, were qualified to perform the work in which said Union Chairman was employed at that time.

14. The petitioners, and each of them, thereupon protested against their being laid-off as aforesaid and the retention of said Union Chairman with less seniority in respondent's active employment, and thereafter petitioners

Campbell and Joplin were restored by respondent to active employment on July 15, 1946, and petitioner Kirk was so restored on July 16, 1946.

15. Had the petitioners, and each of them, not been laid-off they would have received from respondent as salary for their services during said period the following sums: James L. Campbell—\$168.00; Mitchell B. Joplin—\$124.56; [104] and Malcolm E. Kirk—\$190.00.

Dated: January 24, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER and

JAMES C. R. McCALL, JR.

Assistant United States Attorneys

By James C. R. McCall, Jr.

Attorneys for Petitioner

ROGER B. SMITH

ROBERT H. CANAN and

MARK E. TRUE

By Mark E. True

Attorneys for Respondent

HINDIN, WEISS AND GIRARD

By Maurice J. Hindin

Attorneys for Intervenor

[Endorsed]: Filed Jan. 24, 1947. Edmund L. Smith,
Clerk. [105]

[Title of District Court and Cause]

MOTION OF INTERVENOR FOR REHEARING,
OR FOR NEW TRIAL

Comes now, Aeronautical Industrial District Lodge 727, intervenor in the above captioned matter, and respectfully moves the Court for a rehearing, or for a new trial upon the following grounds:

1—That the ordered and proposed Judgment is contrary to the law.

2—That the proposed conclusions of law are erroneous and constitute errors of law.

3—That since date of the Order for Judgment, questions of law directly and materially affecting the substantial rights of parties have been decided by the Circuit Court of Appeals, and that the said decisions of the Circuit Court of Appeals materially affect the matters contained in this action. [138]

Intervenor's Motion is made and based upon Memorandum of Points and Authorities attached hereto, upon this Motion, and upon all the records and files of the above captioned action.

Wherefore, intervenor prays that a rehearing may be granted, or in lieu thereof, that a new trial may be granted herein and for such other and further Orders as to the Court may be meet and just in the premises.

Dated: June 25, 1947.

HINDIN, WEISS AND GIRARD

By Maurice J. Hindin

Attorneys for Intervenor. [139]

MEMORANDUM OF POINTS AND
AUTHORITIES.

I.

Rights of a veteran to reemployment and to seniority rights are subject to the terms and provisions of collective bargaining agreements in effect at the time the reemployment of a veteran is sought, not at the time of his induction into the service, provided that such contract does not discriminate against veterans as such. A veteran's rights to seniority and reemployment under Selective Service Act are subject to changes in seniority provisions in collective bargaining agreements during the time he is in service. A change in seniority provisions which provides for top seniority for certain Union officers is a reasonable provision and does not discriminate against veterans. Under such circumstances, a veteran is not entitled to seniority rights above such Union officers notwithstanding that he is credited with longer period of employment, and notwithstanding that these top seniority provisions were not in effect at the time of his induction.

Gauweiler vs. Elastic Stop Nut Corp., (U. S. Circuit Court of Appeals, Third Circuit, Case No. 9253, decided May 20, 1947) (12 L. C. #63,783.

Koury vs. Elastic Stop Nut Corp., (U. S. Circuit Court of Appeals, Third Circuit, Case No. 9272, decided May 20, 1947) 12 L. C. #63,784.

DiMaggio vs. Elastic Stop Nut Corp., (U. S. Circuit Court of Appeals, Third Circuit, Case No. 9271, decided May 20, 1947) 12 L. C. #63,785.

Payne vs. Wright Aeronautical Corp., (U. S. Circuit Court of Appeals, Third Circuit, Case No. 9216, 9217, 9227, decided May 20, 1947) 12 L. C. #63,786.

II.

A new trial may be granted in actions tried without a jury for any of the reasons for which rehearings have heretofore been [140] granted in suits in equity in Courts of the United States.

Federal Rules of Civil Procedure, Rule 59 (a).

III.

The Court has power to order a rehearing under Rule 59 (a) 2.

Seymour vs. Potts and Callahan, 2 F. R. D. 38.

Respectfully submitted,

HINDIN, WEISS AND GIRARD

By Maurice J. Hindin

Attorneys for Intervenor [141]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 25, 1947. Edmund L. Smith,
Clerk. [142]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

FINDINGS OF FACT

The above-entitled case was submitted to the Court after argument of counsel, on an agreed stipulation of facts by the parties, dated January 24, 1947, and the Court adopts such stipulation and an additional stipulation entered into in open court July 15, 1947, as its findings of fact herein.

CONCLUSIONS OF LAW

1. The petitioners are reemployed veterans of the armed forces of the United States, and are entitled to the benefits of Section 8 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. A. App. Sec. 308) and Section 7 of the Service Extension Act of 1941, as amended (50 U. S. C. A. App. Sec. 357). [143]

2. During petitioners' absence in the armed forces, and prior to their restoration in their former positions in the respondent's employ, the collective bargaining agreement between the respondent and the intervening union, regulating working conditions in those positions, was changed in such manner as to accord to union chairmen, employed in similar positions, "top seniority" over all other like employees, in the event of lay-offs due to curtailment of work. Prior to this change, and at the time when the petitioners left their positions to enter the armed forces, the collective bargaining agreement provided for lay-offs on the basis of straight seniority, alone. This change in the seniority system at the plant tended to alter ad-

versely, the seniority status of reemployed veterans, and thereby to diminish the reemployment benefits which Congress secured to them by law; and the attempted change was, as to reemployed veterans, void and of no effect during their statutory year of reemployment.

3. Within one year after his restoration to his former position as flight and service mechanic, each of the petitioners was laid off, due to curtailment of work, while a union chairman with less seniority than any of the petitioners, was continued in active employment by the respondent in their job classification, under the "top seniority" provision of the intervenor's contract above mentioned; and by reason of such action, the petitioners suffered losses of wages as follows: James L. Campbell, \$168.00; Mitchell B. Joplin, \$124.56; and Malcolm E. Kirk, \$190.00. The petitioners are entitled to be compensated by the respondent for such loss of wages.

4. A judgment requiring the payment of such compensation and the costs of the case will be entered herein against respondent.

July 17

Dated: ~~May~~, 1947.

C. E. BEAUMONT

United States District Judge

Approved as to form as required by Rule 7(a).

Dated: May 12th, 1947.

MARK E. TRUE

Attorney for Respondent

MAURICE J. HINDIN

Attorney for Intervenor

[Endorsed]: Filed Jul. 17, 1947. Edmund L. Smith,
Clerk. [144]

In the District Court of the United States in and for the
Southern District of California,

Central Division

No. 6028-B Civil

JAMES L. CAMPBELL, MITCHELL B. JOPLIN
and MALCOLM E. KIRK,

Petitioners,

vs.

LOCKHEED AIRCRAFT CORPORATION, a corpo-
ration,

Respondent,

AERONAUTICAL INDUSTRIAL DISTRICT
LODGE 727, an unincorporated association,

Intervenor.

JUDGMENT

This case was tried and submitted by the parties upon the entire record in the case, including a stipulation of facts dated January 24, 1947, and the Court having considered the same, and orally stated its opinion on the issues, and made and entered its Findings of Fact and Conclusions of Law, it is

Ordered, Adjudged and Decreed by the Court, as follows:

(1) That respondent Lockheed Aircraft Corporation pay to the petitioners the amount of their respective losses of wages, as follows: James L. Campbell, \$168.00; Mitchell B. Joplin, \$124.56; and Malcolm E. Kirk, \$190.00; and pay the court costs incurred by the United States herein. [145]

(2) That provisions of the collective bargaining agreement executed between respondent corporation and intervenor union, dated June 4, 1945, and more particularly seniority provisions with reference to union chairmen, is inapplicable and not binding upon the petitioners.

(3) That execution may issue for the sums decreed to be paid.

July

Dated: this 17th day of ~~May~~, 1947.

C. E. BEAUMONT

United States District Judge

Approved as to form as required by Rule 7(a)

Dated: May, 1947.

MARK E. TRUE

Attorney for Respondent

JAMES C. R. McCALL, JR.

Attorney for Petitioners

Judgment entered July 17, 1947. Docketed July 18, 1947. Book 44, page 280. Edmund L. Smith, Clerk; by Francis E. Cross, Deputy.

[Endorsed]: Filed Jul. 17, 1947. Edmund L. Smith, Clerk. [146]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that Aeronautical Industrial District Lodge 727, an unincorporated association, Intervenor in the above captioned action hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Final Judgment entered in the above captioned action on the 17th day of July, 1947, (Civil Order Book No. 44, page 280).

Dated: this 9th day of Sept., 1947.

HINDIN, WEISS AND GIRARD

By Maurice J. Hindin

Attorneys for Appellants, Aeronautical Industrial
District Lodge, 727,

111 West 7th St., Los Angeles 14, Cal. [147]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 9, 1947. Edmund L. Smith,
Clerk. [148]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 153, inclusive, contain full, true and correct copies of Petition for Enforcement of Veterans' Reemployment Rights; Answer of Respondent Lockheed Aircraft Corporation; Answer of Aeronautical Industrial District Lodge 727; Stipulation; Petitioners' Trial Memorandum; Intervener's Trial Memorandum; Trial Memorandum of Respondent Lockheed Aircraft Corporation; Motion of Intervenor for Rehearing or for New Trial; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Bond on Appeal and Designation of Record on Appeal which, together with copy of Reporter's Transcript of proceedings on April 25, 1947 and July 15, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$27.40 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 2 day of October, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Campbell E. Beaumont, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Friday, April 25, 1947

Appearances:

For the Petitioners: James M. Carter, United States Attorney; by Ronald Walker, Assistant United States Attorney, Chief of Civil Division; and James C. R. McCall, Jr., Assistant United States Attorney.

For the Respondent: Roger B. Smith, Robert H. Cahan, Mark E. True, Legal Department, Lockheed Aircraft Corporation, Burbank, California.

For the Intervener Aeronautical Industrial District Lodge No. 727: Hindin, Weiss and Girard, 111 West 7th Street Building, Los Angeles, California.

Los Angeles, California, Friday, April 25, 1947,
1:30 p. m.

The Court: The court asked you gentlemen to come in here on the case of Campbell v. Lockheed.

Did you get the names of those appearing, Mr. Clifton?

The Clerk: Yes, I did, your Honor.

The Court: The last time you were here we were all in agreement, I believe, that it would be advisable for the court to await the decision in the Trailmobile case.

This has now come down. It appears to the court from the statements made by the Supreme Court in its opinion—perhaps the statements were there in the decision of the

Court of Appeals but not so clearly set forth as in the Supreme Court's decision—that the action complained of was beyond the statutory period of one year. That is the period with which the decision is chiefly concerned.

I suppose all of you agree with the court that it is clear in the Trailmobile case that the acts were after the one-year period; is that correct?

Mr. Hindin: In the instant case, your Honor?

The Court: In the Trailmobile case.

Mr. Hindin: Yes, your Honor.

Mr. True. In the Trailmobile case.

Mr. McCall: Yes, that is true.

Mr. Hindin: Yes. [3*]

The Court: So for that reason I say factually it does not have the compelling force in this case that we probably thought it did when we were here before.

Now, I had prepared for reading a short statement when this matter came up last time we were in court; and if I had decided it then, my decision would have been based on that memorandum.

I have not changed my mind at all since that time, and I shall just read the statement that I had prepared.

In the case at bar an agreement was entered into by intervener and respondent while petitioners were absent in the military service. As the result of this agreement petitioners were "laid off," while a union chairman was retained. The chairman had less seniority than petitioners and was kept at work solely by virtue of this agreement.

*Page number appearing at top of page of original Reporter's Transcript.

Intervener relies largely on the case of *Fishgold v. Sullivan*, 328 U. S. 275. I do not view such case as binding herein because of factual difference (1). Also it must be borne in mind that the court in that case said that no agreements "between employers and union can cut down the service adjustment benefits" secured to veterans under the act. Certainly seniority is one of such benefits, and this bene- [4] fit was "cut down" by the agreement between employer and union.

In reaching the conclusion that the petitioners are entitled to prevail here, it does not mean that the court is "granting the veteran an increase in seniority over what he would have had if he had never entered the armed services" or that he has received a "step-up or gain in priority" within the inhibition of the *Fishgold* case. He is not being given something new by way of advancement; he is merely restored to the seniority position he had when he left for military service, plus the time accumulation for his military absence to which he is, in any event, clearly entitled. In other words, he merely steps back upon the same step of the seniority escalator on which he was standing when he stepped off to enter the military service. The union chairman either was on a lower step or took his position on the escalator while the veteran was absent. No agreement between employer and union made in the veteran's

(1) In the *Fishgold* case the men preferred over the veteran had a higher shop seniority than the veteran.

absence could give the chairman a place above him in seniority.

I think I might add that after reading the Trailmobile case I believe there is a part here which well could be read as having the same construction as was placed by myself upon that point.

This is on page 18 of the advance sheet of the opinion and it refers to the Fishgold case. This is the statement: [5]

“For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining or of the employer’s administration of general business policy.
. . . .”

In other words, that principle involved there is the very basis upon which I felt that this case should be decided. Therefore, judgment is ordered for the petitioners.

[Endorsed]: Filed 6/2/47. Edmund L. Smith, Clerk.
[6]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Fresno, California, Tuesday, July 15, 1947.

Appearances:

For the Petitioners: James M. Carter, United States Attorney, by James C. R. McCall, Jr., Assistant United States Attorney.

For the Respondent: Mark E. True, Esq., Legal Department, Lockheed Aircraft Corporation, Burbank, California.

For the Intervenor: Hindin, Weiss and Girard, by Maurice Hindin, Esq., 111 West 7th Street, Building, Los Angeles, California.

Fresno, California, Tuesday, July 15, 1947.

10:00 a. m.

The Court: I have considered this very carefully and I have not changed my mind about the proper decision in this case. I feel that a liberal construction of the Act under the evidence justifies the position assumed by petitioners and the view expressed by the court in its statement April 25, 1947.

That part of the intervenor's argument which has to do with the practical side of the question I think is answered by the dissenting judge in the Payne case where he said:

"Nor do we feel that the employers are faced with an impossible task in the adoption of a formula which would not only be workable but thoroughly consonant with the views herein expressed."

And that is borne out by our situation in this case, as stated by Mr. True, attorney for Lockheed.

I would not decide this case at the present time, but would wait for a final decision by the Supreme Court in the Gauweiler case, if it were not for the position of Lockheed. I do not believe it makes any difference how this court decides it because these four New Jersey cases will probably be before the Supreme Court. I am assuming that a writ of certiorari will be requested. I do not believe it really [2] serves the purpose of your company greatly, Mr. True to have a decision now. But you think it does, and you have a right to a decision; so the court is deciding it. Probably there will be a decision by the Supreme Court in the Gauweiler case before the ruling herein can be put into effect, for no doubt there will be an appeal from this court's judgment.

As I said in my opinion before, it seems to the court that the veteran merely steps back upon the same step of the seniority escalator on which he was standing when he stepped off to enter the military service.

I believe that is consistent with the holding in the Fishgold case and also with the statement in the Trailmobile case where it said:

“For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining or of the employer's administration of general business policy
* * *

So judgment is ordered for the petitioners.

There was some question as to the findings.

I do not have the forms here with me that were presented.

Mr. McCall: There was no discussion as to the findings, your Honor. It was in the form of judgment. Mr. Hindin thought that he would prefer to have added to the judgment one paragraph.

Mr. Hindin: I have it here. The judgment as prepared [3] by Mr. McCall simply read, "That respondent Lockheed Aircraft Corporation pay to petitioners the amount of their respective losses of wages as follows:" and then it gives the amounts, "and pay court costs incurred by the United States herein."

In order that the main issue, that is, the respective seniority rights, be properly presented in the record, I suggested a second paragraph to the judgment, which reads:

"That the provisions of the collective bargaining agreement executed between respondent corporation and intervenor union dated June 4, 1945, and more particularly the seniority provision with reference to union chairman, is inapplicable and not binding upon the petitioners."

In other words, I should not like the record to go up where there may be a question that the only thing decided by the court was whether the petitioners were entitled to the matter of the monetary damages. I think that the real gravamen of the cause of action is whether or not the agreement of June 4th is binding upon the petitioners, and by the inclusion of that one sentence in the judgment the record would thus properly show it.

Mr. McCall: I had no objection to the inclusion of that in the judgment particularly, your Honor, except as I told Mr. Hindin at the time—

The Court: I didn't hear you. [4]

Mr. McCall: I had no objection to the inclusion of that in the judgment because that is what the court did judge or hold, but the same matter had been included in the conclusions of law, which were prepared by me and which the court was to sign, and as I stated to Mr. Hindin my impression of the judgment was simply the final ordering part of what the court did and not the—

The Court: I think strictly speaking you are correct in your view of the office of the judgment.

Mr. McCall: So I told him I didn't care to have it in there, but if your Honor wanted to put it in it was all right with me. I said the repetition of it in the judgment after it has been stated in the conclusions would merely tend to indicate the court might be a little bit proud of its opinion, and I didn't know whether your Honor wanted to include it in that way or not.

The Court: Let's get Mr. True's view of it. What do you think about its inclusion in the judgment?

Mr. True: If it appears in the conclusions of law, I would be inclined to feel that it would then be properly before an appellate court in the event an appeal is taken. And, secondly, when a judgment in money is rendered against this corporation it can only be rendered under these facts upon the theory that the union chairmen provision does not apply to petitioners. [5]

The Court: Do you think it is properly included in the conclusions?

Mr. True: Yes, I feel it is.

The Court: I do not think it makes any difference one way or the other. If it is in the conclusions I think it will serve all purposes that Mr. Hindin would have in mind. There is no question that we like to have our findings, conclusions, and judgment artistically drawn, but it is not so important one way or the other. So I think it may be included.

I don't have the forms of judgment that you presented with me. Or if they are here, I don't know where to find them because my secretary is away. I am going to San Francisco, I have to be there next week, and then I am going back to Los Angeles. I can possibly have them sent up to me before I leave here this week and sign them.

I think the fact stated by Mr. True should be made a part of the record. This case was tried on a statement of facts and unless it is agreed that that be made a part of the record I am afraid that it will not be considered by an appellate court. When we have an agreed statement of facts it is not necessary to have findings. But if you gentlemen would agree that the statement made by Mr. True is correct, and that it be made a part of the statement of facts, or be considered as a part, that will be all that will be necessary.

Mr. Hindin: Specifically, now, what portion of the [6] statement is it that you have asked us to stipulate to? That in the operation of the business of Lockheed they have tried it under several ways?

Mr. True: That in the operation of the business of Lockheed, the defendant corporation has operated, first, under the policy of complying with the contract granting union chairmen top seniority and applying that provision to veterans returning from the service; that, secondly,

Lockheed has operated under the policy of employing and retaining in their employment veterans and not considering that the provision of the contract giving union chairmen top seniority is binding upon those veterans; and that the application of either policy has not proved inconvenient to the company.

The Court: That is the statement that I think should go in as part of the record in view of the opinions in these Third Circuit cases.

Do you have any objection to its going in, Mr. Hindin?

Mr. Hindin: No, I have no objection, but I believe a further statement should go in, in order to present the full picture, and that is that the corporation has not attempted to operate with reference to reinstatement of veterans inducted before the new contract and after the new contract simultaneously and at the same time.

The Court: I do not know whether they have. What is the fact in that case, Mr. True? [7]

Mr. True: The facts in that case are these: During the time we were applying this provision to the veterans we found that almost without exception every veteran who left our employment to go into the armed forces had gone in prior to June 4, 1945, and accordingly we did not draw the distinction which Mr. Hindin makes.

The Court: I think it is proper to have that in, in view of Mr. Hindin's request. I really am of the opinion that it is not a part of this case because of the factual situation, but in view of Mr. Hindin's request I think that also should be made a part of the record.

Are you willing to stipulate that it may be?

Mr. True: I will so stipulate.

The Court: And Mr. McCall?

Mr. McCall: Yes, I will so stipulate.

Mr. Hindin: I will so stipulate.

Mr. McCall: Could it be possible without having that stipulation formally drawn up and signed by us, let it be ordered by the court and the reporter prepare that part of the transcript dealing with the statement made by Mr. True down to the present moment and that that be filed as a part of the stipulation?

Mr. True: Yes.

Mr. Hindin: Yes, that is satisfactory.

The Court: That is satisfactory. [8]

Mr. Hindin: In order that there be no misunderstandings, while I want to stipulate to the facts as presented by Mr. True in his stipulation, I don't want it to be understood that I concede as to the facility of operation or the applicability of that particular matter with reference to the case at issue.

The Court: You are only stipulating to the fact and not that it has any legal bearing. That will be a matter to be determined later.

Very well. I think that concludes our hearing this morning. Court is now recessed.

[Endorsed]: Filed Sep. 9, 1947. Edmund L. Smith, Clerk. [9]

[Endorsed]: No. 11750. United States Circuit Court of Appeals for the Ninth Circuit. Aeronautical Industrial District Lodge 727, an unincorporated association, Appellant, vs. James L. Campbell, Mitchell B. Joplin, Malcolm E. Kirk and Lockheed Aircraft Corporation, a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 3, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,750

AERONAUTICAL INDUSTRIAL DISTRICT

LODGE 727, an unincorporated association,

Appellant and Intervenor Below,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN

and MALCOLM E. KIRK,

Appellees and Petitioners Below,

LOCKHEED AIRCRAFT CORPORATION, a corporation,

Appellee and Respondent Below.

DESIGNATION OF RECORD AND STATEMENT
OF POINTS UPON WHICH APPELLANT INTENDS TO RELY.

To the Clerk of the U. S. Circuit Court of Appeals and to James L. Campbell, Mitchell B. Joplin and Malcolm E. Kirk, Petitioners and Appellees, and to Messrs. James M. Carter, Ronald Walker and James C. R. McCall, Jr., Attorneys for Petitioners and Appellees, and to Lockheed Aircraft Corporation, Respondent and Appellee, and to Messrs. Robert B. Smith, Robert H. Canan and Mark E. True, Attorneys for Respondent and Appellee:

You and Each of You Will Please Take Notice that Appellant and Intervenor, Aeronautical Industrial Dis-

trict Lodge 727, hereby designates the contents of record on appeal as follows:

* * * * * * * * *

Please take further notice that the points upon which Appellant and Intervenor intends to rely are as follows:

1—That upon the stipulated facts in the above captioned action, the Court erred as a matter of law in the rendition of its judgment against Intervenor and Appellant herein.

2—That the Judgment of the Court is against the law.

Dated: November 10, 1947.

HINDIN, WEISS AND GIRARD

By Maurice J. Hindin

Attorneys for Appellant and Intervenor.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 12, 1947. Paul P. O'Brien,
Clerk.

No. 11750

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, and
unincorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM
E. KIRK and LOCKHEED AIRCRAFT CORPORATION, a
corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

HINDIN, WEISS AND GIRARD,
111 West Seventh Street, Los Angeles 14,
Attorneys for Appellant.

TOPICAL INDEX

	PAGE
Statement of facts.....	1
Argument	5
I.	
All seniority rights are based on contractual rights only.....	5
II.	
Employees' rights to seniority may be increased or decreased or changed from time to time by the process of collective bargaining	5
III.	
The petitioner appellees are not entitled to any greater senior- ity by reason of their military service than they would have had, had they been continuously employed on the job dur- ing the period that they served in military service.....	6
IV.	
Reemployment rights under Selective Service Act do not pre- vent modification or changes in existing union contracts so long as such changes do not discriminate against veterans....	10
Conclusion	11

TABLE OF AUTHORITIES CITED

CASES	PAGE
DiMaggio v. Elastic Stop Nut Corp., 162 F. (2d) 546, 12 Lab. Cases 71103.....	7
Elder v. New York Central Railway, 152 F. (2d) 361.....	5
Fishgold v. Sullivan Dry Dock and Repair Co., 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 963, 11 Lab. Cases No. 51232.....	7, 9
Gauweiler v. Elastic Stop Nut Corp., 162 F. (2d) 448, 12 Lab. Cases 71079.....	6, 7, 9, 10, 11
Koury v. Elastic Stop Nut Corp., 162 F. (2d) 544, 12 Lab. Cases 71101	7
McQuay Norris v. N. L. R. B., 116 F. (2d) 748.....	5
National Labor Relations Board v. John Englehorn & Sons, 134 F. (2d) 553.....	5
Payne v. Wright Aeronautical Corp., 162 F. (2d) 549, 12 Lab. Cases 71106	7
Pueblo Gas and Fuel Co. v. N. L. R. B., 118 F. (2d) 304.....	6
Trailmobile v. Whirls, 7 U. S. S. Ct. Bulletin 1547, 67 S. Ct. 982, 12 Lab. Cases No. 51247.....	7

STATUTES

Selective Training and Service Act of 1940, Sec. 8 (50 U. S. C. A., Sec. 403, 1946 Supp., p. 58; 54 Stat. 890 (1940); 58 Stat. 799 (1944)	4
Selective Training and Service Act of 1940, Sec. 8(e) (50 U. S. C. A. App., Sec. 308(e)).....	3
Service Extension Act of 1941, Sec. 7 (50 U. S. C. A. App., Sec. 357).....	3

No. 11750
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, and
unincorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM
E. KIRK and LOCKHEED AIRCRAFT CORPORATION, a
corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Facts.

No dispute exists with reference to the facts in this case. A stipulation covering all of the facts was filed in the case by all of the parties [Tr. of Record p. 97].

The pertinent facts in summary are as follows: The petitioners and appellees, James L. Campbell, Mitchell B. Joplin and Malcolm E. Kirk, at the time of their induction into the Army were employees of appellee, Lockheed Aircraft Corporation, and were members in good standing of the appellant, Aeronautical Industrial District Lodge 727. At the time of their induction into the Army, a collective bargaining agreement was in effect between the appellant Union and the appellee, Lockheed Aircraft Corporation, governing the conditions of em-

This litigation involves the following portions of Section 8 of the Selective Training and Service Act of 1940 as amended, (50 U. S. C. A., Sec. 403, 1946 Supplement, page 48; 54 Stat. 890 (1940) as amended, 58 Stat. 799 (1944).)

"Sec. 8 (b) In the case of any person who, in order to perform such training and service, has left or leaves a position, other than a temporary position * * * (B) if such position was in the employee of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

ARGUMENT.

I.

All Seniority Rights Are Based on Contractual Rights Only.

Employment in and of itself does not carry with it any inherent right to seniority. Seniority rights exist by virtue of a contractual agreement or statute only. Without a collective bargaining agreement, or other contract creating seniority rights, an employee has no inherent right to seniority.

Elder v. New York Central Railway, 152 F. (2d) 361.

In the instant case, the only rights of the petitioners and appellees to seniority rights are based on the collective bargaining agreement executed between the appellant Union and appellee, Lockheed Aircraft Corporation, and but for these collective bargaining agreements there would be no right of seniority in the petitioners and appellees.

II.

Employees' Rights to Seniority May Be Increased or Decreased or Changed from Time to Time by the Process of Collective Bargaining.

A Union certified for collective bargaining is the duly qualified and regular agent to represent its members and all other employees within its bargaining group and to bargain for them and to make valid contracts for them and on their behalf, and the employees are bound by the terms of such contracts.

McQuay Norris v. N. L. R. B., 116 F. (2d) 748;
N. L. R. B. v. John Englehorn & Sons, 134 F. (2d) 553.

The employer is likewise bound to deal with the authorized collective bargaining agent.

Pueblo Gas and Fuel Co. v. N. L. R. B., 118 F. (2d) 304.

In the instant case there is no question that the appellant Union was the authorized bargaining agent for its employees and for the petitioner appellees as members of the Union and there is no question but that all of the employees within the bargaining unit were bound by the terms of the successive agreements.

Likewise it is not disputed that had the petitioner appellees been continuously employed at the appellee Lockheed Aircraft Corporation plants on and after June 5th, 1945, rather than having been in service with the military forces, they would have been bound in all respects by the seniority provisions of the second Collective Bargaining Agreement which became effective June 5, 1945.

III.

The Petitioner Appellees Are Not Entitled to Any Greater Seniority by Reason of Their Military Service Than They Would Have Had, Had They Been Continuously Employed on the Job During The Period That They Served in Military Service.

The Supreme Court of the United States has not yet passed upon this particular question. The particular question, however, has been decided by the United States Circuit Court of Appeals for the Third Circuit in the case of:

Gauweiler v. Elastic Stop Nut Corp., 162 F. (2d) 448 (12 Labor Cases p. 71079) decided May 20, 1947.

On the same day the Third Circuit Court of Appeals decided three other cases directly involving the same factual situation and questions of law. They were the cases of:

Koury v. Elastic Stop Nut Corp., 162 F. (2d) 544, 12 Labor Cases p. 71101;

DiMaggio v. Elastic Stop Nut Corp., 162 F. (2d) 546, 12 Labor Cases p. 71103;

Payne v. Wright Aeronautical Corp., 162 F. (2d) 549, 12 Labor Cases p. 71106.

The Third Circuit Court of Appeals, in deciding these cases cited and referred to the Supreme Court, decisions in the case of *Fishgold v. Sullivan Dry Dock and Repair Co.*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 963, 11 Labor Cases No. 51232, and the case of *Trailmobile v. Whirls*, 7 U. S. S Ct. Bulletin 1547, 67 S. Ct. 982, 12 Labor Cases No. 51247.

While portions of the Supreme Court opinion in the *Fishgold* case are cited and referred to in the *Gauweiler* case, appellant feels it desirable to call to the court's attention the following pertinent language appearing in the *Fishgold* case as follows:

"These guarantees are contained in Section 8 of the Act and extend to a veteran, honorably discharged and still qualified to perform the duties of his old position. (1) He has a stated period of time in which to apply for reemployment. 8 (b). He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life. (2) He must be restored to his former position 'or to a position of like seniority, status, and pay.' 8 (b) (A) (B). He is thus protected against receiving a job inferior to

that which he had before entering the armed services. (3) He shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. 8 (c). *Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the War.* (4) He 'shall not be discharged from such position without cause within one year after such restoration'." 8 (c). (Italics here for emphasis only.)

In defining the rights which the veteran has by way of seniority the Supreme Court used the following language:

"As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. *But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services.* We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. *No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more.*" (Italics here for emphasis only.)

Likewise the Court indicated that the provisions against the discharge of employees are relative only. The Court in that connection declared as follows:

“Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran’s rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year.”

The test therefore, as laid down by the Supreme Court in the *Fishgold* case appears to be in substance, that a veteran is entitled to the same job and the same incidents therewith, as he would have enjoyed had he continued in the job as an employee doing the same kind of work throughout the time he was absent for military duty. In other words, he would be entitled to the same rights as he would have enjoyed had he remained on the job, and the Court definitely refused to accept the proposition that the veteran is entitled to any greater rights, or in other words, it denied the veteran any greater seniority than he would have had he remained on the job. The test in this case therefore, resolves itself to an examination of the rights of the petitioners and appellees had they been on the job throughout the entire period that they were in military service.

The Court in the *Gauweiler* case held, that the veteran is bound by contractual changes relating to his employment made in his absence, just as he would have been

bound had he been on the job, so long as the changes were not discriminatory against veterans as such. No such contention is made here. It is respectfully submitted that the *Gauweiler*, *Koury*, *DeMaggio*, and *Payne* cases above cited are direct and controlling authority and highly persuasive authorities relative to the facts and law applicable in this case and that this Court should follow the rules laid down in these cases.

IV.

Reemployment Rights Under Selective Service Act Do Not Prevent Modification or Changes in Existing Union Contracts so Long as Such Changes Do Not Discriminate Against Veterans.

There is no question that the appellant Union and the employer appellee had the right to make modifications or changes in existing contracts nor is there any question that the agreement of June 5, 1945, was in all respects valid and binding with reference to all employees then at work. The Circuit Court in the *Gauweiler* case, and the other cases above cited, recognizes the rule that the rights of all employees to seniority, status, and pay are determined by and dependent upon the applicable provisions of collective bargaining agreements in effect between the union and employer. The Court in the *Gauweiler* case and in the other cases decided by the Third Circuit on the same day, recognized the validity of such contracts and also recognized the applicability of the provisions of such contracts to employees on military leave. The only limitation noted by the Court was that the contract not contain discriminatory provisions against veterans. In the instant case, the contract of June 5, 1945, was applicable to all employees whether veterans or not.

The *Gauweiler* case also recognized legitimate reasons for collective bargaining agreements to provide for seniority for union officials. It would appear therefore that since the employee petitioners would have been bound by all of the terms of the agreement of June 5, 1945, had they been at work at the employer's plant on and after June 5, 1945, rather than being absent on military leave, it would follow that they should be bound by the terms of the new agreement.

The reasonableness of the appellant's position is seen when it is considered that the petitioners and appellees during the entire period of their reemployment received, enjoyed and accepted without complaint all of the benefits secured for them by the new collective bargaining agreement. Only when they were confronted with a provision of the new agreement which did not please them did they demand to be restored to some of the rights they had under the old agreement.

The *Gauweiler* case is authority for the proposition that the petitioners and appellees should be bound by the provisions of the collective bargaining agreement in effect at the time of their layoff and may not rely on the agreement in effect at date of their induction into military service.

Conclusion.

Wherefore, appellant prays this Honorable Court reverse the judgment entered by the trial Court in the instant case.

Respectfully submitted,

HINDIN, WEISS AND GIRARD,

By MAURICE J. HINDIN,

Attorneys for Appellant.

No. 11750
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, an un-
incorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM E.
KIRK and LOCKHEED AIRCRAFT CORPORATION, a cor-
poration,

Appellees.

BRIEF OF APPELLEES JAMES L. CAMPBELL,
MITCHELL B. JOPLIN AND MALCOLM E.
KIRK.

FILED

APR 10 1948

JAMES M. CARTER,

United States Attorney;

CLYDE C. DOWNING,

*Assistant United States Attor-
ney, Chief of Civil Division;*

JAMES C. R. MCCALL, JR.,

*Assistant United States
Attorney,*

United States Postoffice and
Courthouse Building, Los Angeles 12,
Attorneys for Appellees.



TOPICAL INDEX

	PAGE
Jurisdiction	1
Statutes involved	2
Questions involved	4
Statement of the case.....	6
Argument	12

I.

The "top seniority" clause discriminated against veterans as a class, differently from nonveterans, since they were separately classified for seniority purposes by statute and agreement. Veterans were secured against any loss of seniority rank thereunder, while others were not. The argument that there was "equal discrimination" is irrelevant and incorrect 13

II.

The superseniority for union chairmen provision was void and ineffective as to the veterans during their reemployment year 18

III.

The Gauweiler cases are unique, were decided by a divided court, are unsound at law and inapplicable here, and should not be followed by this court..... 36

Conclusion 40

ii.

TABLE OF AUTHORITIES CITED

CASES	PAGE
Ahlquist v. Alaska Portland Packard Assn., 39 F. (2d) 348.....	34
Armstrong v. Tenn. C. I. & R. Co., 73 F. Supp. 329.....	25, 29, 30
Atchison, Topeka & Santa Fe R. Co. v. Judson Freight Forwarding Co., 49 F. Supp. 789, affd. 150 F. (2d) 210.....	32
Bateman v. Fullen, 28 N. Y. S. (2d) 230.....	27
Boston & Maine R. Co. v. Hayes, 160 F. (2d) 325.....	29
Brooklyn Bank v. O'Neal, 324 U. S. 697, 65 S. Ct. 895, 89 L. Ed. 1296.....	33
Brown v. Luster, 165 F. (2d) 181.....	31
Bryant v. Brotherhood, 74 F. Supp. 510.....	10, 25, 35
Clark v. Claremont Apt. Hotel Co., 19 Wash. (2d) 115, 141 P. (2d) 403, 153 A. L. R. 50.....	34
Curtis v. Railroad P. I. Agency, 71 F. Supp. 153.....	25
Dacey v. Bethlehem Steel Co., 66 F. Supp. 161.....	31
DiMaggio v. Elastic Stop Nut Corp., 162 F. (2d) 546.....	9, 10, 11, 23, 25, 39
Elder v. New York Cent. R. Co., 152 F. (2d) 361.....	26, 34, 37
Erie R. Co. v. Williams, 233 U. S. 685, 34 S. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097.....	33, 39
Farmers & M. Bank v. Fed. Res. Bank, 262 U. S. 649, 43 S. Ct. 651, 67 L. Ed. 1157.....	14
Fishgold v. Sullivan Corp., 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, 167 A. L. R. 110.....	5, 8, 9, 22, 23, 24, 26, 30, 31, 36, 37
Fitzsimons v. Eagle Brewing Co., 107 F. (2d) 712, 126 A. L. R. 681, and note 126 A. L. R. 685.....	32
Freeman v. Gateway Baking Co., 68 F. Supp. 383.....	24, 25, 29
Gauweiler v. Elastic Stop Nut Corp., 69 Fed. Supp. 294.....	9, 10, 13, 16, 17, 25, 26, 36, 39
Grand Int. Brotherhood v. Mills, 43 Ariz. 379, 31 P. (2d) 971....	28

Grubbs v. Ingalls Iron Works, 66 F. Supp. 550.....	31
Hales v. Snowden, 19 Cal. App. (2d) 366, 65 P. (2d) 847, cert. den. 302 U. S. 715.....	14
Hall v. Union L. & P. Co., 53 F. Supp. 817.....	30
Home B. & L. Assn. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481.....	14
Hoyer v. United Dressed Beef Co., 67 F. Supp. 730.....	30
Industrial Commission v. Aetna L. Ins. Co., 64 Colo. 480, 174 Pac. 589, 3 A. L. R. 1343.....	14
Kay v. General Cable Corp., 144 F. (2d) 653.....	29
Kephart v. United States, 74 F. Supp. 578.....	24, 27, 31
Kirkman v. MacMorland, 71 F. Supp. 15.....	27
Koury v. Elastic Stop Nut Corp., 11 C. C. H. Labor Cases, p. 70071, No. 63,448.....	10
Loew's Inc. v. Basson, 49 F. Supp. 66.....	31, 37
Markham & Callow v. Int. Woodworkers, etc., 170 Ore. 517, 135 P. (2d) 727.....	32
Martino v. Mich. Window Cleaning Co., 327 U. S. 173, 66 S. Ct. 379, 90 L. Ed. 603.....	33, 34
Morris v. C. & O. R. C., 75 F. Supp. 429.....	24, 31
National Labor Relations Board v. Fansteel Metal Corp., 306 U. S. 240, 56 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599....	31
National Labor Relations Board v. Indiana Desk Co., 149 F. (2d) 987	36
National Licorice Co. v. N. L. R. B., 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799.....	32, 36
Niemiec v. Seattle-Rainier B. Club, 67 F. Supp. 705.....	29
Northwest Steel R. Mills v. Com. Int. Rev., 110 F. (2d) 286, rev'd on other grounds 311 U. S. 49.....	14
Parker v. Maynard Boyce, Inc., 74 F. Supp. 581.....	24, 29

Payne v. Wright Aeronautical Corp. (D. C., N. J., 1946, unreported)	10, 11, 17, 25, 39
Piercy v. L. & N. R. Co., 198 Ky. 477, 248 S. W. 1042, 33 A. L. R. 322.....	34, 36
Reutschler v. Mo. Pac. R. Co., 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1.....	34
Sage v. Hampe, 235 U. S. 99, 35 S. Ct. 94, 59 L. Ed. 147.....	32
Salter v. Becker Roofing Co., 65 F. Supp. 633.....	29
Southern S. S. Co. v. Labor Board, 316 U. S. 31, 62 S. Ct. 886, 86 L. Ed. 1246.....	36
State of Washington v. Maricopa County, Ariz., 152 F. (2d) 556, cert. den. 327 U. S. 799.....	14
Steele v. L. & N. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173	32, 34, 36
The Henry S. Grove, 22 F. (2d) 444.....	34
Tipper v. No. Pac. R. Co., 62 F. Supp. 853.....	29
Trailmobile Co. v. Whirls, 331 U. S. 40, 67 S. Ct. 982, 91 L. Ed. 939.....	9, 10, 15, 18, 21, 23, 24, 26, 30, 31, 35, 37
Tunstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187	32, 34
United States v. Dietrich, 126 Fed. 671	14
Unruh v. No. Amer. Creameries, Inc., 70 F. Supp. 36.....	25
Waters v. Buck, 36 N. Y. S. (2d) 834.....	27
West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 81 L. Ed. 703, 108 A. L. R. 1330.....	34
Whitver v. Aalfs Maker Mfg. Co., 67 F. Supp. 524.....	29

STATUTES

Code of Federal Regulations (1944 Supp.), Title 5, Part 12, Sec. 12.302 (c, d), 9 Federal Register 13699, Nov. 16, 1944..	27
Fair Labor Standards Act (29 U. S. C., Secs. 206-207, 212)....	32
Federal Employer's Liability Act (45 U. S. C., Secs. 51-60).....	33

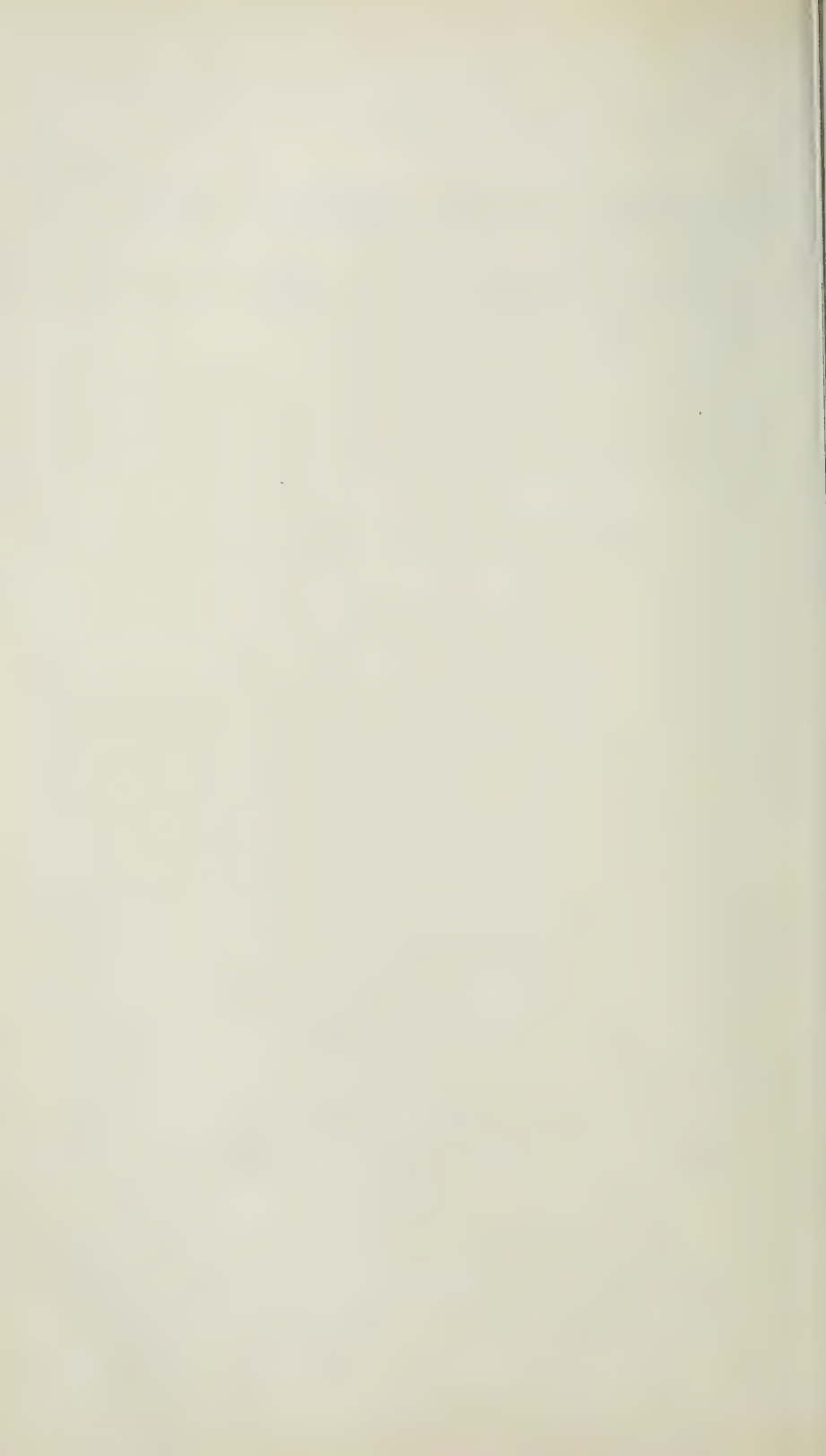
	PAGE
Judicial Code, Sec. 128(a)-First (28 U. S. C., Sec. 225(a)- First)	2
Labor Code, Secs. 200-212	33
Labor Code, Secs. 222-224	33
Labor Code, Sec. 510.....	33
Labor Code, Secs. 554-555	33
Labor Code, Sec. 601.....	33
Labor Code, Sec. 607.....	33
Labor Code, Sec. 750.....	33
Labor Code, Sec. 800.....	33
Labor Code, Secs. 850-852	33
Labor Code, Sec. 1182.....	33
Labor Code, Sec. 1184.....	33
Labor Code, Secs. 1197-1198	33
Labor Code, Secs. 1250-1253	33
Labor Code, Secs. 1290-1298	33
Labor Code, Sec. 1308.....	33
Labor Code, Sec. 1350.....	33
National Labor Relations Act (29 U. S. C., Secs. 157-160).....	33
Railway Labor Act (45 U. S. Code, Secs. 151-154, 181).....	33
Safety Appliance Act (45 U. S. C., Secs. 1-12, 17, 23, 62-63, 65)	33
Selective Training and Service Act of 1940:	
Sec. 8	1, 2, 4, 5, 13, 15, 23, 31, 32, 35
Sec. 8(b)	2, 4, 5, 14, 16, 25, 26, 27, 28, 38
Sec. 8(c)	3, 4, 5, 9, 14, 16, 25, 26, 27, 28, 38
Sec. 8(e)	2, 31, 32
Sec. 8(e)	3
Sec. 11	3
Sec. 16(b)	3

Service Extension Act of 1941, Sec. 7 (50 U. S. C. A. App., Sec. 357)	4
United States Code, Title 5, Secs. 631-633 as modified, 645a(b), 652, 669-670, 707, 861.....	27
United States Code Annotated, Title 50, App., Sec. 301.....	1, 35
United States Code Annotated, Title 50, App., Sec. 308 (b, c)	14, 24
United States Code Annotated, Title 50, App., Sec. 308(e).....	
.....	2, 31, 32
United States Code Annotated, Title 50, App., Sec. 311.....	31, 32

TEXTBOOKS

12 American Jurisprudence, Sec. 153, p. 647.....	32
12 American Jurisprudence, Sec. 166, p. 661.....	33
12 American Jurisprudence, Sec. 240, pp. 769-772.....	14
31 American Jurisprudence, Secs. 96, 99, 102, pp. 873-874.....	34
31 American Jurisprudence, Sec. 102, p. 875.....	37
31 American Jurisprudence, Secs. 408, 421-423, 459, 469, 498, pp. 1035, 1042-1043, 1061, 1065, 1078.....	33
117 American Law Reports, p. 825.....	37
142 American Law Reports, pp. 1055-1056, note.....	26, 27
67 Corpus Juris, Sec. 8, p. 307.....	34
17 Corpus Juris Secundum, Secs. 191, 194, pp. 545-548, notes 92-94 and 11	32
17 Corpus Juris Secundum, Sec. 330, pp. 782-785.....	14
31 Corpus Juris Secundum, Secs. 55(b), 123, 128, pp. 232, 393	15
4 Restatement of Torts, Sec. 794.....	31
4 Restatement of Torts, Sec. 795.....	31
4 Restatement of Torts, Sec. 796.....	31

Roget's International Thesaurus of English Words and Phrases (Thomas Y. Crowell Co., N. Y., 1930), p. 47.....	28
1 Teller, Labor Dispute & Collective Bargaining, Secs. 94, 210 (1940 Ed. and 1946 Cum. Supp.).....	31
2 Teller's Labor Disputes & Collective Bargaining (Cum. Supp., Apr., 1947), Sec. 423J, p. 301.....	24
Webster's New International Dictionary (2d Ed.), p. 2278.....	27
47 Yale Law Journal, p. 73.....	26, 27



No. 11750

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, an un-
incorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM E.
KIRK and LOCKHEED AIRCRAFT CORPORATION, a cor-
poration,

Appellees.

**BRIEF OF APPELLEES JAMES L. CAMPBELL,
MITCHELL B. JOPLIN AND MALCOLM E.
KIRK.**

Jurisdiction.

Laid-off for about three weeks during their reemploy-
ment year as the result of an impairment of their statutory
seniority rank, the three appellee Veterans sued and re-
covered judgment against their employer, the appellee
Company, for their resulting loss of wages, in the United
States District Court for the Southern District of Cali-
fornia, pursuant to Sec. 8 of the Selective Training and
Service Act of 1940, as amended.¹

¹This Act is referred to herein as the "STSA." It appears in
50 U. S. C. A. App., Sec. 301 et seq.

The appellant Union voluntarily intervened as an additional respondent, to oppose the Veterans'² petition; and it appeals from the judgment.

Jurisdiction below rested on STSA,³ Sec. 8(e), 50 U. S. C. A. App., Sec. 308(e); and that here on Judicial Code, Sec. 128(a)-First, 28 U. S. Code, Sec. 225(a)-First.

Statutes Involved.

1. STSA, Secs. 8(b,c,d), 11 and 16(b), which provide as follows:

Sec. 8(b)—“In the case of any such person, who, in order to perform such training and service (in the armed forces), has left or leaves a position other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—”

. . .

“(B) If such position was in the employ of a private employer, such employer shall restore such person to such position, or to a position of like seniority, status and pay, unless the employ-

²Whenever used herein, the word “*veteran*” means an honorably discharged member of the armed forces who has not, for *as much as one year*, been reemployed in his former position of employment, or its equivalent, and who is still entitled to the protection and benefits of STSA Sec. 8; while “*nonveterans*” refers to all other employees of a veteran’s employer, regardless of their military or naval service. The “*Veterans*” means the appellees James L. Campbell, Mitchell B. Joplin and Malcolm E. Kirk, who were veterans when the *res litigiosae* arose.

³See Footnote 1, *supra*.

er's circumstances have so changed as to make it impossible or unreasonable to do so;" . . .

Sec. 8(c)—“Any person who is restored to a position in accordance with the provisions of paragraph (A) and (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, *shall be so restored without loss of seniority*, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.”

Sec. 8(e)—“*In case any private employer fails or refuses to comply* with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, *to specifically require such employer to comply* with such provisions, and, as an incident thereto, *to compensate* such person for any loss of wages or benefits suffered by reason of such employer's *unlawful action*.”

Sec. 11—“. . . any person who . . . in any manner shall knowingly fail or neglect to perform any duty required of him under . . . this Act, . . . shall, upon conviction . . . be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment. . . .”

Sec. 16(b)—(Excepts Sec. 8 from the expiration clause and continues it in effect indefinitely.)

2. The Service Extension Act of 1941, as amended, 50 U. S. C. A. App., Sec. 357, which provides as follows:

Sec. 7—"Any person who, subsequent to May 1, 1940, and prior to the termination of the authority conferred by section 2 of this joint resolution, shall have entered upon active military or naval service in the land or naval forces of the United States shall be entitled to all the reemployment benefits of section 8 of the Selective Training and Service Act of 1940, as amended." . . .

Questions Involved.

The basic questions are:

A. Is the "seniority" mentioned in STSA, Sec. 8(b,c), statutory or contractual in nature?

B. Is that seniority "subject to" collective bargaining; or is valid collective bargaining necessarily "subject to" such seniority?

C. Under Art. IV, Secs. 3(A), 3(D) and 6 of the 1945 Agreement, the latter incorporating STSA, Sec. 8 therein [R. pp. 58-63, 100-105], was the Veterans' seniority properly subordinated to the new constructive "top seniority" for junior union chairmen (nonveterans) on layoffs during their reemployment year: (a) within the real meaning of the Agreement; or (b) under STSA, Sec. 8(b,c)? That is, was the new, constructive "top seniority" clause ineffective under the Agreement, or void at law, as to veterans for the statutory year of their reemployment?

This case is the reverse of that considered in *Fishgold v. Sullivan Corp.*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, 167 A. L. R. 110 (1946).

There a junior veteran⁴ claimed superseniority⁵ over senior nonveterans on layoffs by virtue of STSA, Sec. 8. Here the Union, by virtue of a new collective bargaining agreement which it assumes to have that meaning, is claiming, on layoffs, superseniority for certain junior nonveterans (officers of the Union) over such veterans despite STSA, Sec. 8(b,c).

The Veterans' position is that STSA, Sec. 8, does not give veterans superseniority over other employees; but that, for one year, it did affirmatively forbid an employer to extend constructive superseniority over veterans to junior nonveterans, where no such superseniority existed when they entered the armed forces; that the 1945 Agreement does not do so, when properly interpreted; and that it would be *pro tanto* void, if it did, as the District Court held.

⁴See Footnote 2, *supra*.

⁵"Seniority" is used in this brief to mean an employee's status or rank in a system under which his employer, on the basis of their respective lengths of service in his employ, determines the order of priority among his employees for certain incidents of employment, such as promotion, demotion, layoff, callback, transfer, job assignments, etc. The word means rank based on length of service, and refers simultaneously and concomitantly to the incidents of employment governed thereby. (See Points II(14-15), pp. 27-28, *infra*.)

"Superseniority" means an arbitrarily higher rank in such a system, assigned to an employee out of seniority order. It is in derogation, not in furtherance, of the principle of seniority.

Statement of the Case.⁶

The appellee Veterans are employed as Field and Service Mechanics in the airplane factory of the appellee Company⁷ at Burbank, California. The appellant Union⁸ is the collective bargaining representative for certain employees in the factory, including Field and Service Mechanics.

Two collective bargaining agreements have been negotiated between the Company and Union from 1941 to date. The first was effective from September 15, 1941, to June 4, 1945, and the second thereafter to date. The two are referred to herein as the 1941 Agreement and the 1945 Agreement, respectively.

Under the seniority system established by the 1941 Agreement, each employee's seniority accumulated from the date of his original hire, and was called "company-wide" seniority. Subject to exceptions not material here, layoffs were made under it, within any occupational group affected by a shortage of work, in the reverse order of the company-wide seniority of the employees therein. That is, actual seniority governed the order of layoffs within occupational groups. [R. pp. 102, 194.]

⁶The facts appear in two stipulations, one oral and one written, incorporated in the Court's opinions and findings. Exhibits A and B to the written stipulation are identical with the same exhibits to the Veterans' petition. [R. pp. 11-18, 97-109, 111-112, 117-120, 121-27.]

⁷Lockheed Aircraft Corporation.

⁸Aeronautical Industrial District Lodge No. 727 of the International Association of Machinists.

In the 1945 Agreement, substantially this same layoff system was continued by Art. IV, Sec. 3(A), except that Art. IV, Sec. 3(D), provided as follows:

“(D) Top Seniority for Union Chairmen for Purpose of Layoffs.—For the purpose of applying the temporary and general layoff procedures, union chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain chairmen.” [R. p. 61.]

Under the 1945 Agreement, as under the 1941, actual seniority was followed in making promotions, transfers, etc., with no preference for union chairmen in that regard.

Each Agreement made express provision for the re-employment of veterans. The 1945 Agreement provided in Sec. 6 of Art. IV (the seniority article), that:

“Employees (other than temporary employees) who shall have left the employment of the Company for the purpose of entering the armed forces of the United States, shall be reemployed by the Company in accordance with the Selective Training and Service Act of 1940, as such Act may be amended.” [R. p. 63.]

Each Agreement provided for the selection and duties of union chairmen. They were to cooperate in settling differences arising out of employment in the plant. [R. pp. 19, 49, 103-104.]

While union membership was not a condition of employment under either Agreement, Veterans Joplin and Kirk have been members of the Union since 1943, and Veteran Campbell was a member from November 2, 1942, until March 1, 1946. [R. pp. 13-14, 47-48, 97-98.]

The Veterans were originally hired in 1942-1943, and were employed as Field and Service Mechanics when they left to enter the United States Army in 1944-1945. The 1941 Agreement was then in effect. In 1945-1946, after the new 1945 Agreement became effective, the Veterans were honorably discharged from military service, and within 90 days afterward, applied for and were re-employed as Field and Service Mechanics by the Company.

In June, 1946, within a year after being so restored, in a cut-back under Art. IV, Sec. 3(A), due to a shortage of work for Field and Service Mechanics, each Veteran was laid-off, the Company retaining in its active employ, however, a Field and Service Mechanic who was junior to him in actual seniority, but who was "deemed" to have "top-seniority," under the Union's and Company's then interpretation of Art. IV, Secs. 3(D) and 6 of the 1945 Agreement.

The Veterans protested the layoff. On July 15-16, 1946, they were called-back and put to work.

In the layoff interval, they had suffered a loss of wages as follows: James L. Campbell, \$168; Mitchell B. Joplin, \$124.56; and Malcolm E. Kirk, \$190. [R. p. 107.]

On November 27, 1946, the Veterans filed this suit to recover their loss of wages from the Company, claiming they had not been restored without loss of seniority, and were wrongfully laid-off. [R. pp. 9, 88.] The Company answered denying liability on December 13, 1946. [R. pp. 89-91.] The Union applied for and was permitted, under the *Fishgold Case*, 328 U. S. at pp. 281-284, 291-292, to intervene as an added respondent and to file a separate answer, which it did on January 6, 1947. [R. pp. 92-96.]

From a judgment in favor of the Veterans against the Company for the wages lost, the Union alone has appealed. [R. pp. 111-115.]

Under the *Fishgold Case, supra*, the Union's appealable interest is confined to the legal issue whether the District Court properly held the new "top seniority" clause (Sec. 3(D) either: (a) ineffective as to the Veterans for their reemployment year under Sec. 6, Art. IV, of the Agreement, quoted, *supra*; or (b) void as to them for the same period because unlawful under STSA, Sec. 8(c).

In preparation for the trial, the parties filed a written stipulation of facts on January 24, 1947. [R. pp. 97-107.]

In view of the then pendency before the United States Supreme Court of the case of *Trailmobile Co. v. Whirls*, 331 U. S. 40, 67 S. Ct. 982, 91 L. Ed. 939 (1947), which involved a related seniority issue, the District Court did not decide this case until after the decision in that case became available in April, 1947.

Previously, all District Courts which had passed on the legality of "top seniority for union officials" clauses, inserted in collective bargaining agreements during the absence of veterans in the armed forces, had held such clauses void and ineffective as to such veterans during their reemployment year.

Gauweiler v. Elastic Stop Nut Corp., 69 Fed Supp. 294 (D. C., N. J., 1946);

DiMaggio v. Elastic Stop Nut Corp., 11 C. C. H. Labor Cases p. 70072, No. 63,449 (D. C., N. J., 1946);

Koury v. Elastic Stop Nut Corp., 11 C. C. H. Labor Cases p. 70071, No. 63,448 (D. C., N. J., 1946);

Payne v. Wright Aeronautical Corp. (D. C., N. J., 1946, unreported).

On April 25, 1947, the District Court orally ruled in favor of the Veterans in accordance with these cases, and the *Trailmobile Case*, in an opinion appearing at pages 117-120 of the Record. Formal findings and judgment had not been entered, however, when on May 20, 1947, in one day, the Third Circuit Court of Appeals reserved all four of the above "anti-top seniority for union officials" decisions.

The reversing opinions are as follows:

Gauweiler v. Elastic Stop Nut Corp.,⁹ 162 F. (2d) 448 (3 C. C. A., 1947);

DiMaggio v. Elastic Stop Nut Corp., 162 F. (2d) 546 (3 C. C. A., 1947);

Koury v. Elastic Stop Nut Corp., 162 F. (2d) 544 (3 C. C. A., 1947);

Payne v. Wright Aeronautical Corp., 162 F. (2d) 549 (3 C. C. A., 1947).

⁹"*Gauweiler Cases*" is used herein to refer collectively to the four opinions of the Third Circuit Court of Appeals in the *Gauweiler*, *DiMaggio*, *Koury* and *Payne Cases* cited above. The collective name is proper since the cases were all decided the same day by the same Court, on similar facts, and the other three refer to the *Gauweiler Case* as authority.

Thereafter, upon application of the appellant Union the District Court reopened this case for further hearing. After reargument and a *further stipulation*, however, the District Court again ruled in favor of the Veterans on July 15, 1947, and awarded judgment for them against the Company. [R. pp. 108-110, 121-127.]

The *further stipulation* considered by the Court at the rehearing was as follows:

“That in the operation of the business of Lockheed, the defendant corporation has operated, first, under the policy of complying with the contract granting union chairmen top seniority and applying that provision to veterans returning from the service; that, secondly, Lockheed has operated under the policy of employing and retaining in their employment veterans, and not considering that the provision of the contract giving union chairmen top seniority is binding upon those veterans; and that *the application of either policy has not proved inconvenient to the company.*” [R. pp. 125-126.]

This further stipulation distinguishes this case, on its facts, from the “impossible” or “impractical” situation envisioned in the majority opinions in the *Payne* and *DiMaggio Cases*, *supra* (162 F. (2d) 547-8, 551).

ARGUMENT.

The judgment should be affirmed because:

1. The "top seniority" clause discriminated against veterans as a class, differently from nonveterans, since they were separately classified for seniority purposes by statute and agreement. The veterans were secured against any loss of seniority rank thereunder; other employees were not. The argument that there was "equal discrimination" against veterans and others is irrelevant and incorrect.

2. Superseniority for union chairmen was properly held ineffective as to the Veterans because:

Their seniority was fixed by statute incorporated in Art. IV, Sec. 6, of the 1945 Agreement. This *statutory seniority* was not adversely alterable in favor of anyone. The Company breached the Agreement by subordinating the seniority rank so fixed to constructive superseniority for junior chairmen in the layoff. If Sec. 3(D), Art. IV, was intended to have that effect, it was unlawful.

The minimum seniority (both the rank and rights appurtenant) of a veteran on reemployment is precisely fixed by law; and is not subject to impairment through collective bargaining, any more than his right to "like status" and "like pay," or his right to wait 90 days before applying for reemployment, or other rights created by the reemployment law. All are immutable through collective bargaining.

Like other labor laws, such as those protecting women and children, regulating wages, hours, safety, etc., the veterans reemployment law is neither inconsistent with the right of collective bargaining, nor

subject to impairment or evasion by collective bargaining. An employer cannot escape his duties under labor laws through collective bargaining; and a collective bargaining representative, as such, has no authority to waive the protection of such laws for the statutory beneficiaries. Collective bargaining is subject to existing labor laws; not contrary to them.

3. The *Gauweiler Cases* are unique and unsound in holding veterans' statutory seniority rights subject to collective bargaining; they were decided by a divided Court; are inapplicable to this case on the facts; and should not be followed by this Court.

I.

The "Top Seniority" Clause Discriminated Against Veterans as a Class, Differently From Nonveterans, Since They Were Separately Classified for Seniority Purposes by Statute and Agreement. Veterans Were Secured Against Any Loss of Seniority Rank Thereunder, While Others Were Not. The Argument That There Was "Equal Discrimination" Is Irrelevant and Incorrect.

1. The 1945 Agreement did not have the effect of subordinating the seniority rank of veterans¹⁰ to constructive superseniority for junior union chairmen on layoffs, as the District Court properly held [R. p. 114]; because the terms of STSA, Sec. 8 were expressly incorporated into Art. IV, Secs. 3(A), 3(D) and 6 of the Agreement, and so *exempted veterans* from any such demotion, or

¹⁰See Footnote 2, *supra*.

impairment of their restored seniority rank, *for one year*.
[R. pp. 60, 61, 63.]

50 U. S. C. A. App., Sec. 308(b, c).

See Points II(1) (a, b, c, e) and II (2, 6), *infra*,
pp. 18-20, 22-25.

2. Regardless of Sec. 6, the same exemption would be deemed written by law into Sec. 3(D), in view of STSA, Sec. 8(b,c), because—

“Laws which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms . . . This principle embraces alike those which affect its validity, construction, discharge or enforcement.”

Home B. & L. Assn. v. Blaisdell, 290 U. S. 398,
429-430, 54 S. Ct. 231, 78 L. ed. 413, 88 A. L.
R. 1481;

Farmers & M. Bank v. Fed. Res. Bank, 262 U. S.
649, 660, 43 S. Ct. 651, 67 L. Ed. 1157, 1164;

State of Washington v. Maricopa County, Ariz.,
152 F. (2d) 556, 559 (C. C. A. 9, 1945), cert.
den. 327 U. S. 799;

Northwest Steel R. Mills v. Com. Int. Rev., 110 F.
(2d) 286, 289 (C. C. A. 9, 1940), rev'd on other
grounds 311 U. S. 49;

United States v. Dietrich, 126 Fed. 671, 675 (C.
C. Neb., 1904);

Hales v. Snowden, 19 Cal. App. (2d) 366, 65 P.
(2d) 847, cert. den. 302 U. S. 715;

Indust. Com. v. Aetna L. Ins. Co., 64 Colo. 480,
174 Pac. 589, 3 A. L. R. 1343;

Texts: 17 C. J. S. 782-785, *Contracts*, Sec. 330;
12 *Am. Jur.* 769-772, *Contracts*, Sec. 240.

3. The Congress in STSA, Sec. 8, and the Union and Company in Art. IV, Sec. 6, each classified veterans (for one year) separately and apart from other employees, with especial reference to this particular matter of their “seniority.” There is no mistaking the intent. The statute, which twice mentions seniority, was adopted in the *seniority article* (Art. IV) of the 1945 Agreement itself. [R. pp. 58-63.]

4. Nonveterans are excluded from this “extraordinary statutory security” extended to veterans by law and contract.

Trailmobile Case, 331 U. S. at pp. 57, 59-60;
Point III(5), *infra*, pp. 37-38.

5. Since it recognized that veterans’ seniority is statutory, and not identical with that of other employees, the Union should be estopped to argue the contrary, as it seeks to do. [R. p. 61; Applt. Br. 5-10.]

31 C. J. S. 232, 393, Estoppel, Secs. 55(b), 123, 128.

6. The Union admits (or claims) the Veterans suffered a “loss of seniority”; but argues the irrelevant point that there was “no discrimination against veterans as such,” which point is incorrect as well as irrelevant. *The STSA forbids any “loss of seniority” at all, in favor of anyone.* The protected veterans were the sole discriminatees in this layoff, for they alone had a legal right to *exemption* from the seniority demotion incident to the superseniority provision. [See Appl. Br. p. 3; and Points I(1-4), *supra*.]

7. The Union’s argument that there was “equal discrimination” against all employees not union chairmen,

and consequently “no discrimination against veterans as such,” begs the question. This could be true only if it be assumed that all discriminatees had identical legal rights, which, in this case, is to assume the non-existence or inefficacy of Sec. 6, Art. IV of the Agreement and STSA, Sec. 8(b,c), in so far as seniority rights are concerned. This being its end argument, the Union would beg the point at the outset with the premise of “equal discrimination.”

8. This same flaw in logic appears in the majority opinion in the *Gauweiler Case*, where it is said:

“It is to be emphasized that in our case there is no suggestion of discrimination against veteran-employees . . . Discrimination would, obviously, change the whole picture . . .

“The considerations above stated bring us to the conclusion that the employee absent in war service is bound by the non-discriminatory arrangements made between the bargaining unit and the employer during his absence . . . The veteran does not lose by his absence. He simply remains as if he were on the job and subject to the well-established and accepted routine of collective bargaining, so far as this particular right of seniority is concerned.”

Gauweiler Case, 162 F. (2d) at pp. 451-452.

9. We are unable to see how this statement of law may be reconciled with statute and precedent. [See 331 U. S. 56, 58-59, 60; STSA, Sec. 8(b,c).] But, aside from that, the *Gauweiler Case* majority here appears to be pursuing this reasoning:

Veterans have no more security from loss of seniority through collective bargaining than nonveterans

(who have none), because (and only because) there is no discrimination against them as veterans; which premise, in turn, could be true only if veterans have no more security from loss of seniority through collective bargaining than nonveterans (who have none), which could be true only if there is “no discrimination,” which depends on “no security,” which depends on “no discrimination,” which depends etc. etc.

10. This would seem to be reasoning in a circle. The basic holding of the majority in the *Gauweiler Case*, of course, is that *veterans have no security against loss of seniority through collective bargaining for the reemployment year*, and are subject to the *same hazards* in that regard as nonveterans. Only on *that premise* could it be said that there was “no discrimination against veterans as such.”

11. In this case, there was discrimination against veterans as a class, in that their rights under the *statute and agreement* were violated; and nonveterans had no share whatever in those rights.

12. There was factual discrimination against veterans also, notwithstanding the Union’s argument; for, by reason of their absence in military service, the Veterans lost opportunities for becoming union chairmen, and these places were filled to their disadvantage by other employes.

Payne Case, 162 F. (2d) at pp. 551-552.

II.

**The Superseniority for Union Chairmen Provision
Was Void and Ineffective as to the Veterans
During Their Reemployment Year.**

1. In the *Trailmobile Case*, 331 U. S. at pp. 53-60, the Supreme Court considered and passed on every phase of law and fact involved here, resolving them all in favor of the Veterans, in the following language:

(a) Footnote 23, 331 U. S. at p. 53:

“The position to which an employee must be restored is either the position previously held or ‘a position of like seniority, status, and pay.’ See note 18. *It is thus recognized that part of the restored ‘position’ is the seniority accrued prior to service in the armed forces and, under the Fishgold case, during service. ‘Seniority’ is part of ‘position,’ and therefore, when the Act states in subsection (c) that the veteran may not be discharged ‘from such position’ it means both from the job itself and from the seniority which is part of the job.*” . . .

(b) At Page 55:

“The real trouble however is in the basic premise both grammatically and substantively. It assumes not only the complete independence of the last clause of §8 from what precedes, but also that employment within the meaning of the Act is something wholly distinct and separate from its incidents, *including seniority, rates of pay, etc.* We think, however, that the idea of total severability is altogether untenable. To accept it would do violence both to the grammatical and to the substantive structure of the statute.

“The clause is neither an independent sentence nor a disconnected prohibition without significant relationship to what precedes. ‘From such position’ has no meaning severed from the prior language. *The restoration provisions define the very character of the place not only to which the veteran must be restored but equally from which he is not to be discharged.* Neither grammatically nor substantively could the discharge provision be given effect without reference to the prior ‘restoration’ clauses. *Fishgold v. Sullivan Drydock & Repair Corp., supra.* Indeed such reference is explicit both in the phrase ‘from such position’ and in the time provision itself, namely, ‘within one year after such restoration.’” . . .

(c) At Page 56:

“ . . . The Court held, indeed, that the Act did not give him standing to *outrank* nonveteran employees who had *more than the amount of seniority to which he was entitled* and to which he had been restored; in other words, that he was not given so-called ‘superseniority.’ But, it also squarely held that he was given security not only against complete discharge, but *also against demotion, for the statutory year.* And demotion was held to mean *impairment of ‘other rights,’* including his restored *statutory seniority* for that year. ‘If within the statutory period he is demoted, his status, which the Act was designed to protect, has been affected and *the old employment relationship has been changed. He would then lose his old position and acquire an inferior one.* He would within the meaning of §8(c) be ‘*discharged from such position.*’” . . .

(d) At Page 57:

"It is therefore clear that Congress did not confer the rights given as incidents of the restoration simply to leave the employer free to nullify them at will, once he had made it. Equally clearly Congress did not create them to be operative for the vaguely indefinite and variously applicable period of a reasonable time. But we cannot agree that they were given to last as long as the employment continues, *unaffected by expiration of the one-year period.*

"To accept this conclusion, as we have said, would mean 'freezing' the incidents of the employment indefinitely while 'freezing' the right to employment itself for only one year. As long as the employee might remain in his job, his pay could not be reduced, his seniority could not be decreased, insurance and other benefits could not be adversely affected. And this would be true, although for valid reasons all of those rights could be changed to the disadvantage of nonveteran employees having equal or greater seniority and other rights than those of the veteran with restored statutory standing. The reemployed veteran thus not only would be restored to his job simply, as the Fishgold case required, 'so that he does not lose ground by reason of his absence.' 328 U. S. at 285. He would gain advantages beyond the statutory year over such non-veteran employees."

(e) At Pages 58-59:

"It is clear, of course, that *this statutory addition to the veteran's seniority status* is not automatically deducted from it at the end of his first year of re-employment. But the Fishgold decision also ruled expressly that he was not to gain advantage *beyond*

such restoration, by virtue of the Act's provisions, so as to acquire 'an increase in seniority over what he would have had if he had never entered the armed services . . . No step-up or gain in priority can be fairly implied." 328 U. S. at 285-286.

"For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining or of the employer's administration of general business policy. But if this extraordinary statutory security were to be extended beyond the statutory year, the restored veteran would acquire not simply equality with non-veteran employees having identical status as of the time he returned to work. He would acquire indefinite statutory priority over nonveteran employees, a preferred status which we think not only inharmonious with the basic Fishgold rationalization, but beyond the protection contemplated by Congress."

(f) At Pages 59-60:

" . . . Whether or not the collective agreement was valid, or infringed rights of Whirls and other members of that group apart from rights given by §8(c), is not before us, for reasons we have stated. The only question here and the only one we decide is that §8(c), although giving the reemployed veteran a special statutory standing in relation to 'other rights,' as defined in the Fishgold case, during the statutory year, and creating to that extent a preference for him over nonveterans, did not extend that preference for a longer time."

(Note: The collective agreement in *Whirls'* case was not negotiated until over a year after his restoration with full statutory seniority, 331 U. S. 43-44.)

2. The clear meaning of this language of the Supreme Court is:

A veteran's minimum seniority rank on reemployment is fixed by statute, not contract, and is *statutory* rather than *contractual*. (Point II(1)(a, c, e), *supra*.) This rank is determined by adding the period of his absence in the armed forces to his seniority at the time of induction. The rank so fixed is as much a part of the position to which he must be restored as his pay or "other benefits" mentioned in the law. (Point II(1)(a, b, d), *supra*.) The restoration is to be "as nearly a complete substitute for the original job as was possible." [*Fishgold Case*, 328 U. S. at p. 286; Point II(1)(b), *supra*.] Although it is by reference to the former that certain precise characteristics and incidents of the restored position are defined by the law, yet it is the reemployment law itself, not a collective bargaining representative, which fixes the specific assured incidents of the new position. The minimum incidents so fixed are not subject to the hazards of subsequent collective bargaining, although for valid reasons all such incidents could be changed thereby to the disadvantage of a nonveteran employee having equal or greater seniority than a veteran. (Point II(1)(b, d, e), *supra*.) Any impairment of the veteran's seniority rank for the reemployment year is unlawful, whether it occurs as a "loss of seniority" at the time of his reemployment, or as a "discharge" or "demotion" thereafter. (Point II(1) (c), *supra*.) In these respects, a veteran enjoys "extraordinary statutory security" and "statutory priority over nonveterans," and a "prefer-

ence over nonveterans” throughout his reemployment year. (Point II(1)(e, f), *supra*.)

If this is a fair statement of the holding in the *Trailmobile* and *Fishgold Cases*, the judgment below should be affirmed.

3. The Company found no difficulty in applying Sec. 6, Art. IV, and STSA, Sec. 8, when it changed its policies to conform. [R. pp. 125-126.] There is no uncertainty about the layoff procedure required, so long as it is kept in mind that *it is not the veterans, but union chairmen, who are claiming superseniority*. The veterans have no affirmative right to an increase in seniority over anyone; but merely a negative, defensive right *not to be demoted* in seniority under those claiming superseniority over them. Therefore, the required procedure is:

As the layoff line advances up the seniority roster in accordance with Sec. 3(A), Art. IV, there are to be skipped: (1) union chairmen, and (2) any veterans who (a) have been reemployed less than a year and (b) have more seniority than a junior union chairman who has been retained out of actual seniority order under Sec. 3(D), Art. IV. Thereafter, the chairmen and veterans who are so skipped are to be laid-off in their actual seniority order *inter sese*, if a cutback to that extent should be necessary.

4. There can be no doubt about the *layoff rank of anyone* under this system. The merry-go-round of seniority rights envisioned by Judge Biggs in the *DiMaggio Case* (162 F. (2d) at p. 548) has no legal basis. A senior non-exempt nonveteran, so laid-off, would have no legitimate complaint at the proper retention of junior

union chairmen or veterans, if the layoffs are made as stated.

5. It is true that, under this system, some veteran, but not all, will enjoy for their reemployment year a better seniority status than some nonveterans who are not union chairmen. *But, this is the only alternative to an unlawful demotion*, and there is certainly *nothing* in the statute or in any Supreme Court decision that *forbids the preservation of a veteran's seniority rank*, simply because that will *improve his seniority benefits* under conditions created by collective bargaining. The law intended that he should enjoy any betterments in his former position.

Parker v. Maynard Boyce, Inc., 74 F. Supp. 581 (D. C., Calif., 1946);

Freeman v. Gateway Baking Co., 68 F. Supp. 383 D. C., Ark., 1946);

Morris v. C. & O. R. C., 75 F. Supp. 429 (D. C., Ind., 1947);

Kephart v. United States, 74 F. Supp. 578 (Ct. Cl., 1947).

6. "Union agreements may add to the veteran's reemployment rights, but they are invalid to the extent that they cut down the rights granted to war veterans by the reemployment statutes."

Teller's Labor Disputes & Collective Bargaining (Cum. Sup., Apr., 1947), Sec. 423J, Vol. 2, p. 301;

50 U. S. C. A. App., Sec. 308(b, c);

Fishgold Case, 328 U. S. at pp. 283-285;

Trailmobile Case, 331 at pp. 53-60, quoted in Point II(1)(c, d, e), *supra*;

Payne Case, 162 F. (2d) at pp. 551-552;

Morris v. C. & O. R. Co., *supra*;

Bryant v. Brotherhood, 74 F. Supp. 510 (D. C., La., 1947);

Armstrong v. Tenn. C. I. & R. Co., 73 F. Supp. 329 (D. C., Ala., 1947);

Curtis v. Railroad P. I. Agency, 71 F. Supp. 153 (D. C., Mass., 1947);

Unruh v. No. Amer. Creameries, Inc., 70 F. Supp. 36 (D. C., N. D., 1947).

7. The reemployment provisions “define the *very character* of the place . . . to which the veteran must be restored,” in the words of the Supreme Court. [Point II(1)(b), *supra*.] So, for the sake of argument, if it be supposed that the merry-go-round of seniority rights did result from the new superseniority clause, with all the complexities foreseen in the *DiMaggio* and *Payne Cases*, *i. e.*, if it be presumed that there is *no rational way* to give simultaneous effect to superseniority for union chairmen and to preserve veterans from a “loss of seniority” for one year. Which then should prevail, the law or the agreement? The answer is in the question itself; and it is not the same answer as was given in the *Gaurweiler Cases*.

8. The “merry-go-round” view and the “non-discriminatory” premise are alike incorrect, since each assumes at the outset the ineffectiveness of STSA, Sec. 8(b, c) to guarantee a veteran from “loss of seniority” for one year. Each is a mid-way step in a departure from the precise direction of the statute.

9. A veteran’s *seniority rank* over junior employees must be restored to him on his return from the armed

forces. Specifically, the STSA provides that he is to be considered as having been on "furlough or leave of absence," and must be restored to "*a position of like seniority,*" and "*without loss of seniority,*" and "shall not be discharged (demoted) *from such position . . . within one year.*" The effect of this is to "define the *very character* of the place . . . to which the veteran must be restored" in the seniority system. [*Fishgold Case, supra*, at pp. 286-287; and Point II(1)(a-c), *supra*.] The word "like" expressly refers to the attributes of the Veteran's position when he entered the armed forces; and the context prohibits any thought that it is a vicarious reference to the attributes of the employment of others when he returns [STSA, Sec. 8(b,c)]. Consequently, it would be unlawful for a junior union chairman to be "*deemed to have top seniority . . . for . . . layoff procedures*" over a veteran during the restoration year, under Point II(6), *supra*.

10. The exemption of veterans (for one year) from the superseniority clause would have been sustained, if it had been written at length into the 1945 Agreement. And, it was so written by reference and law. (See Point I (1-4), *supra*.)

11. "Seniority arises only out of contract *or statute*." —It is not solely contractual, as the Union contends. (App. I, Br. pp. 5-10.)

Footnote 21, Trailmobile Case, 331 U. S. p. 53;

Footnote 5, Gauweiler Case, 162 F. (2d) p. 452;

Elder v. New York Cent. R. Co., 152 F. (2d) 361, 364 (6 C. C. A., 1945);

Note: 142 *A. L. R.* 1055-1056; 47 *Yale L. J.*, 73 (1937).

12. Many seniority systems exist in the public service by virtue of statutes or regulations issued thereunder. These systems are statutory, not contractual in origin.

Code of Federal Regulations (1944 Supp.), Title 5, Part 12, Sec. 12.302 (c, d), 9 Federal Register 13699, Nov. 16, 1944;

5 *U. S. Code*, Secs. 631-633 as modified, 645a(b), 652, 669-670, 707, 861;

Kirkman v. MacMorland, 71 F. Supp. 15 (D. C., Pa., 1947);

Bateman v. Fullen, 28 N. Y. S. (2d) 230 (Sup. Ct. N. Y., 1941);

Waters v. Buck, 36 N. Y. S. (2d) 834 (Sup. Ct., N. Y., 1942);

Kephart v. United States, 74 F. Supp. 578 (Ct. Cl., 1947).

13. The seniority provisions of STSA, Sec. 8(b, c) are alike applicable both to government employees under Sec. 8(b)(A) and to private employees under Sec. 8(b)(B). The mere fact that a union may have had a part in establishing a private employer's seniority system is immaterial. The statute is not concerned with the origins of the systems, but only with the veteran's former rank and place therein. This rank is preserved by law.

14. Seniority is—

“The status secured by length of service for a company, to which certain rights, as promotion, attach.”

Webster's New Intntl. Dict. (2d) p. 2278;

142 *A. L. R.* 1055; 47 *Yale L. J.*, p. 73, cited *supra*.

“Seniority” is classed as a synonym, in Mawson’s revision of *Roget’s International Thesaurus of English Words and Phrases* (Thomas Y. Crowell, Co., N. Y., 1930), p. 47, with the words:

“Eldership; elders; firstling; *doyen* (Fr.); dean; father; primogeniture.”

15. “Seniority” as used in industry may be more precisely defined as—

An employee’s status or rank in a system under which his employer determines, on the basis of their respective lengths of service in his employ, the order of priority among his employees for certain incidents of employment, such as promotions, demotions, lay-offs, callbacks, transfers, work assignments, etc. The word means rank fixed by length, of service with reference to the incidents of employment governed by the system; and is a concomitant reference to such system and incidents.

An employee’s seniority right is a *quasi-property* right.

Grand Int. Brotherhood v. Mills, 43 Ariz. 379, 31 P. (2d) 971, 979 (1934).

16. “Seniority” is used in STSA, Sec. 8(b, c) to refer both to length of service or rank, and to the incidents of employment covered by the system. It adds the term of his service in the armed forces to the veteran’s former seniority, and, in this manner, establishes *statutory seniority* for the reemployment year. See Prints II(1)(a, b, c), and II(6-7), *supra*.

Bryant v. Brotherhood, supra.

17. This *statutory seniority right*, along with the other rights embraced in the reemployment provision of STSA, Sec. 8, constitute a “floor” below which the incidents of a veteran’s reemployment may not be lawfully reduced. These other rights include:

(a) The right to *wait 90 days* before applying for restoration.

(b) The right thereupon to be restored to his *former position*, although that may involve discharging or breaking a contract with the employee who took his job after induction. [See *Salter v. Becker Roofing Co.*, 65 F. Supp. 633, 636 (D. C., Ala., 1946); *Kay v. General Cable Corp.*, 144 F. (2d) 653 (3 C. C. A., 1944); *Tipper v. No. Pac. R. Co.*, 62 F. Supp. 853, 856 (D. C., Wash., 1945).]

(c) The right, in the alternative, to another position of “*like seniority, status and pay.*”

(d) The right to any *ingrade increases* appurtenant to his restored position. [See *Kay v. General Cable Corp.*, 59 F. Supp. 358 and 63 F. Supp. 791 (D. C., N. J., 1945, 1946); *Armstrong v. Tenn. C. I. & Co.*, *supra*; *Freeman v. Gateway Baking Co.*, *supra*; *Whitver v. Aalfs Maker Mfg. Co.*, 67 F. Supp. 524 (D. S., Iowa, 1946); *Parker v. Maynard Boyce, Inc.*, *supra*; *Niemiec v. Seattle-Rainier B. Club*, 67 F. Supp. 705 (D. C., Wash., 1946).]

(e) The right to be deemed to have been on furlough or leave of absence, instead of having quit. [*Boston & Maine R. Co. v. Hayes*, 160 F. (2d) 325 (1 C. C. A., 1947).]

(f) The right to participate in “*insurance benefits*” offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer *at the time he* (the veteran) *was inducted*,” etc.

(g) The right to participate in “*other benefits*” so offered by the employer at that time. [See Footnote 25, *Trailmobile Case*, 331 U. S. at pp. 53-60.]

(h) The right *not to be* “*discharged*” or demoted without cause within one year after such restoration. [*Fishgold Case*, 328 U. S. at p. 286; *Hoyer v. United Dressed Beef Co.*, 67 F. Supp. 730 (D. C., Calif., 1946).]

(i) The right to *access to court* (rather than to grievance procedure) to compel restoration to his proper position, in case of either an unlawful refusal of, or discharge or demotion from, such position.

(j) The right to be compensated for his *loss of wages* suffered by reason of the employer’s “*unlawful action*.” [*Hall v. Union L. & P. Co.*, 53 F. Supp. 817 (D. C., Ky., 1944); *Armstrong v. Tenn. C. I. & R. Co.*, *supra*.]

18. The statutory seniority is no more subject to be whittled down by collective bargaining than the rights to sue, to wait 90 days before applying, not to be discharged without cause for one year, to be deemed to have been on leave of absence. The seniority right is identical in nature and reference to the rights to “like pay,” “like status,” “insurance and other benefits.” *These guaranteed minimums are not subject to the hazards of collective bargaining. They are statutory, not contractual in nature.*

They do not depend on collective bargaining for definition or clarification, and cannot be cut down by it. [See Point II(1, 6, 9-16), supra.]

19. The incidents of employment to which the STSA, Sec. 8 relate are identified by reference to those inhering in his position when he "left in order to" enter the armed forces.

Fishgold and Trailmobile Cases, supra;

Brown v. Luster, 165 F. (2d) 181, 184 (9 C. C. A., 1947);

Grubbs v. Ingalls Iron Works, 66 F. Supp. 550, 554 (D. C., Ala., 1946);

Dacey v. Bethlehem Steel Co., 66 F. Supp. 161 D. C., Mass., 1946);

Morris v. C. & O. R. Co., *supra*;

Kephart v. United States, supra.

20. It is an "unlawful action" for an employer to fail to restore a veteran "without loss of seniority." And, to coerce, or to cooperate with, an employer to do an unlawful act is an improper, unlawful union objective, which may be enjoined.

50 U. S. C. A. App., Secs. 308(e) and 311;

Restatement and Torts, Vol. 4, Secs. 794-796;

Teller, Labor Dispute & Coll. Bargaining, Vol. 1, Sec. 94, 210 (1940 Ed. and 1946 Cum. Sup.);

Loew's, Inc. v. Basson, 49 F. Supp. 66, 71-72 (D. C., N. Y., 1942);

N. L. R. B. v. Fansteel Metal Corp., 306 U. S. 240, 255-256, 56 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599;

Steele v. L. & N. R. Co. (1944), 323 U. S. 192 at pages 204-207, 65 S. Ct. 226, 89 L. Ed. 173;
Tunstall v. Brotherhood (1944), 323 U. S. 210 at pages 212-214, 65 S. Ct. 235, 89 L. Ed. 187;
Markham & Callow v. Int. Woodworkers, etc., 170 Ore. 517, 135 P. (2d) 727, 749.

21. "An agreement which cannot be performed without a violation of the law is illegal, whether or not the parties knew the law."

12 *Am. Jur.* 647, Contracts, Sec. 153;
17 *C. J. S.*, 545-548, Contracts, Secs. 191, 194, notes 92-94 and 11;
Sage v. Hampe, 235 U. S. 99, 104-105, 35 S. Ct. 94, 59 L. Ed. 147, 150 (1914);
National Licorice Co. v. N. L. R. B., 309 U. S. 350, 359-360, 60 S. Ct. 569, 84 L. Ed. 799 (1940);
A. T. & S. F. R. Co. v. Judson Freight Forwarding Co., 49 F. Supp. 789, 785 (D. C., So. Calif., 1943), affirmed 150 F. (2d) 210;
Fitzsimons v. Eagle Brewing Co., 107 F. (2d) 712, 126 A. L. R. 681 (3 C. C. A., 1939), and note 126 A. L. R. 685;
50 *U. S. C. A. App.*, Secs. 308(e), 311.

22. STSA, Sec. 8 is a new law regulating the employment of a particular class of employees (veterans), similar to laws regulating the employment of women and children, wages and hours, safety, etc. Like other such labor laws, the STSA, Sec. 8 confers statutory protection and individual rights upon particular employees. See, for example:

Fair Labor Standards Act, 29 U. S. C., Secs. 206-207, 212;

National Labor Relations Act, 29 U. S. C., Secs. 157-160;

Safety Appliance Act, 45 U. S. C., Secs. 1-12, 17, 23, 62-63, 65;

Federal Employer's Liability Act, 45 U. S. C., Secs. 51-60;

Railway Labor Act, 45 U. S. Code, Secs. 151-154, 181 *et seq.*;

California Labor Code:

<u>Subject</u>	<u>Sections</u>
Wages—	200-212, 222-224;
Hours—	510, 554-555, 601, 607, 750, 800, 850-852;
Women and Children—	1182, 1184, 1197-1198, 1250-1253, 1290-1298, 1308, 1350.

23. The individual rights of employees benefited or protected by labor laws cannot be waived by a collective bargaining representative, because

(a) Many of these laws cannot be waived even by the beneficiaries themselves.

31 *Am. Jur., Labor*, Secs. 408, 421-423, 459, 469, 498, pp. 1035, 1042-1043, 1061, 1065, 1078;

12 *Am. Jur.* 661, Contracts, Sec. 166;

Eric R. Co. v. Williams, 233 U. S. 685, 34 S. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097;

Brooklyn Bank v. O'Neal, 324 U. S. 697, 704-707, 65 S. Ct. 895, 89 L. Ed. 1296;

Martino v. Mich. Window Cleaning Co., 327 U. S. 173, 177-178, 66 S. Ct. 379, 90 L. Ed. 603;

West Coast Hotel Co. v. Parrish, 300 U. S. 379, 392-399, 81 L. Ed. 703, 57 S. Ct. 578, 81 L. Ed. 703, 108 A. L. R. 1330.

(b) Waiver is a personal privilege which cannot be exercised through an agent without affirmative authorization.

67 C. J. 307, Waiver, Sec. 8.

24. A collective bargaining representative has no inherent authority to waive any individual right secured by the Constitution or laws of the United States to individuals within the bargaining unit it represents.

Steele v. L. & N. R. Co., *supra*;

Tunstall v. Brotherhood, *supra*;

Martino v. Mich. Window Cl. Co., *supra*, p. 33.

25. A collective bargaining representative has no inherent authority to waive a personal seniority right accrued to an individual within the bargaining unit, under a collective agreement then in effect.

Piercy v. L. & N. R. Co. (1923), 198 Ky. 477, 248 S. W. 1042, 33 A. L. R. 322;

Clark v. Claremont Apt. Hotel Co., 19 Wash. (2d) 115, 141 P. (2d) 403, 153 A. L. R. 50, and note pp. 60, 66-72;

Reutschler v. Mo. Pac. R. Co. (1934), 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1;

Elder v. New York Cent. R. Co., 152 F. (2d) 361, 364 (6 C. C. A., 1945);

Ahlquist v. Alaska Portland Packard Assn. (9 C. C. A., 1930), 39 F. (2d) 348;

The Henry S. Grove (C. C. A., D. C., 1927), 22 F. (2d) 444;

Text: Labor, Secs. 96, 99, 102; 31 *Am. Jur.* 873-874.

26. There is no conflict between the right of collective bargaining secured to employees generally under the National Labor Relations Act and the right of a veteran to be restored under STSA, Sec. 8; any more than there is a conflict in the right of collective bargaining and the laws regulating the employment of women and children, wages and hours, safety, etc., above mentioned. An employer is bound to obey all such laws; collective bargaining cannot free him of the duty as regards any individual employee. The employer and the collective bargaining representative must conduct their negotiations in the light of, and in conformity with, the applicable statutes. (See Points II(6) and II(20-25), *supra*.)

“A veteran’s right to be restored to his former position without loss of seniority is an independent and additional right not to be impaired by other protective benefits accorded him by Sec. 301 *et seq.* of this War Appendix, and collective bargaining agreements entered into pursuant to terms of Wagner Act [Sec. 151 *et seq.* of Title 29] must recognize statutory right of veteran to seniority granted him by Selective Service Act [Section 301 *et seq.*] and any agreement which deprives him of that right is invalid to that extent.

“Court would not presume that Congress in failing to amend National Labor Relations Act, section 151 of Title 29, in enacting Section 301 *et seq.* of this War Appendix intended to permit concerted action of collective bargaining agency and employer to destroy or whittle down statutory right of returning servicemen to restoration to seniority security in his job granted by said sections.”

Bryant v. Brotherhood, 74 F. Supp. 510, 513 (D. C., La., 1947), cited *supra*.

III.

The Gauweiler Cases Are Unique, Were Decided by a Divided Court, Are Unsound at Law and Inapplicable Here, and Should Not Be Followed by This Court.

1. Prior to the *Gauweiler Cases* (May 20, 1947), no court had held a veteran's statutory seniority right, nor any other reemployment right, alterable adversely to any degree in favor of anyone by collective bargaining. No court has since so held, so far as appears from the reports. Besides being unique in this respect, the *Gauweiler Cases* appear to be the first in which individual rights under labor laws have been held subject to impairment by collective bargaining. (See Point II(20-26), *supra*.)

2. The legitimate scope of a collective bargaining representative's authority was dangerously inflated, beyond all precedent, when the Third Circuit Court of Appeals majority held that individual statutory rights are subject to diminution or abatement through its action. The ramifications of such a rule are almost incalculable. The matter is of no slight importance, and should be considered here. Compare:

Steele v. L. & N. R. Co., *supra*, at pp. 202-207;

Fishgold Case, *supra*, at p. 285;

Trailmobile Case, *supra*, at pp. 58-59;

Piercy v. L. & N. R. Co., *supra*;

National Licorice Co. v. Labor Board, *supra*;

N. L. R. B. v. Fansteel Metal Corp., *supra*;

Southern S. S. Co. v. Labor Board, 316 U. S. 31, 48, 62 S. Ct. 886, 86 L. Ed. 1246;

N. L. R. B. v. Indiana Desk Co., 149 F. (2d) 987, 990-991 (C. C. A. 7, 1945);

Loew's, Inc., v. Basson, 46 Fed. Supp. 66, 71-72,
cited *supra*;

Authorities cited under Points II(6) and II(20),
supra.

3. If statutory seniority may be whittled down by a collective bargaining representative, then *every other right* in the reemployment law is also subject to adverse alteration to the detriment of a returning veteran; and also, and on the same principle, every labor law fixing wages, hours and working conditions for private employees may be undercut to the detriment of the statutory beneficiaries by a collective bargaining agent. There would be *no security* for employees of any class against the hazards of a collective bargaining representative's preferences.

4. Besides affirmatively stating *twice* that the seniority right of a veteran *cannot* be cut down by collective bargaining, the Supreme Court summed up its view of the certainty of the reemployment law in this sentence: .

"The restoration provisions define the *very character* of the place not only to which the veteran must be restored but equally from which he is not to be discharged."

Trailmobile Case, 331 U. S. at pp. 55, 58-59;

Fishgold Case, 328 U. S. at p. 285.

5. Seniority systems may be altered, and are constantly altered, to the disadvantage of certain employees for the benefit of others. Nonveteran employees have no security against such discriminatory alterations.

Elder v. New York Cent. R. Co., *supra*;

Text: 31 *Am. Jur.* 875, Labor, Sec. 102;

Note: 117 *A. L. R.* 825;

Point II(1)(d), *supra*.

It was in view of this very circumstance, and apparently no other that, having already provided in STSA, Sec. 8(b), that the veteran should have his former position or "a position of like seniority," it repetitiously provided in Sec. 8(c) that he must be restored "without loss of seniority." This meant that he was to have his former seniority rank, *unimpaired and without question*. The labor leaders who helped frame the reemployment section of the STSA must have so understood it.

6. The basic *Gauweiler Case* holding that a veteran's seniority on restoration is "subject to the well established and accepted routine of collective bargaining, so far as this particular right of seniority is concerned" is wholly in-harmonious with STSA, Sec. 8(b,c), itself, and with the Supreme Court's statements in the *Trailmobile Case* that:

" . . . he was given security not only against complete discharge, but also against demotion for the statutory year. And demotion was held to mean impairment of 'other rights,' including his restored *statutory seniority* for that year." (331 U. S. p. 56.)

And,

"For the statutory year indeed, this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining," etc. (331 U. S. 58-59.)

And, that STSA, Sec. 8(c), gives the reemployed veteran

" . . . a special statutory standing in relation to 'other rights' " . . . and creates "to that extent a preference for him over nonveterans" . . . for the reemployment year. (331 U. S. 60.)

7. In each of the *Gauweiler Cases* there was an earnest, dissenting opinion, and each was decided by the Third Circuit Court of Appeals in two-to-one opinions. Of the nine District and Circuit Court judges, who passed on these four cases, *five* held the new superseniority for union officials void as to veterans for one year; *four* held it valid. (See majority and dissenting opinions, 162 F. (2d) 448, 544, 546, 549, and District Court opinions, 69 Fed. Supp. 294, 11 C. C. H. Labor Cases, pp. 70071-70072.)

8. Besides being unique, and out of harmony with the repeated views of the Supreme Court, the *Gauweiler Cases* are inapplicable here on the facts, since: (1) The employer here did not find it "inconvenient" to exempt restored veterans from the superseniority provision; and the merry-go-round of seniority rights discussed in the *DiMaggio* and *Payne Cases* does not apply. [See Point II(3,4), *supra*; R. pp. 125-126.] Also, (2) the 1945 Agreement expressly referred to STSA, Sec. 8, in fixing the seniority rights of various classes of employees in Art. IV, Sec. 6, whereas, it does not affirmatively appear from the *Gauweiler Cases* that any of the collective agreements there involved contained any such express reference fixing veterans' seniority separately from other employees.

9. On the law and facts, therefore, the rule in the *Gauweiler Cases* should not be adopted or followed by this Court. It ought, in fact, to be declared unsound; and the scope of a collective bargaining representative's authority should be declared confined within the limits fixed by

Erie R. Co. v. Williams, *supra*; and authorities cited under Point II(6, 20, 23-25), *supra*.

Conclusion.

The District Court's judgment was sound in law and fact, and should be affirmed.

The circumstances here are such that in doing so, this Court, in the interest of public understanding, may well point out that statutes fixing wages, hours and working conditions, and creating individual rights based thereon, are not subject to alteration or impairment through the medium of collective bargaining; and that employers and collective bargaining agents are bound to conduct their negotiations subject to and in conformity with such laws, otherwise their agreements will be held *pro tanto* void.

This principle has been *twice* stated by the Supreme Court in connection with the very statute here involved; and in the interest of public understanding, it should now be reaffirmed and given effect by this Court.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

CLYDE C. DOWNING,
Assistant United States Attorney, Chief of Civil Division;

JAMES C. R. MCCALL, JR.,
Assistant United States Attorney,

Attorneys for Appellees.

No. 11750
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, an un-
incorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM
E. KIRK and LOCKHEED AIRCRAFT CORPORATION, a
corporation,

Appellees.

**BRIEF OF APPELLEE LOCKHEED AIRCRAFT
CORPORATION.**

ROGER B. SMITH,
ROBERT H. CANAN,
MARK E. TRUE,

2555 North Hollywood Way, Burbank, California,
Attorneys for Appellee Lockheed Aircraft Corporation.

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TOPICAL INDEX

	PAGE
Statement of the case.....	1
Summary of the argument.....	9
Argument	10
I.	
Seniority rights of the veterans exist not solely because of collective bargaining agreements but primarily by virtue of the Selective Training and Service Act.....	10
II.	
Section 3(D), Article IV of the 1945 Agreement conflicts with and detracts from the statutory seniority rights of the veterans and is therefore void as to the veterans.....	14
III.	
Section 3(D), Article IV of the 1945 Agreement discriminates against the veterans and is therefore admittedly void as to them.....	26
Conclusion	27

TABLE OF AUTHORITIES CITED.

CASES	PAGE
DiMaggio v. Elastic Stop Nut Corp., 162 F. (2d) 546.....	17
DiMaggio v. Elastic Stop Nut Corp., 11 C. C. H. Labor Cases, p. 70072, No. 63,449 (D. C., N. J., 1946).....	19
Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 963.....	12, 15, 18, 20, 21, 23, 25
Fishgold v. Sullivan Drydock & Repair Corp., 154 F. (2d) 785..	22
Gauweiler v. Elastic Stop Nut Corp., 162 F. (2d) 448.....	17, 18, 19, 25, 26
Gauweiler v. Elastic Stop Nut Corp., 69 F. Supp. 294.....	19
Koury v. Elastic Stop Nut Corp., 162 F. (2d) 544.....	17
Koury v. Elastic Stop Nut Corp., 11 C. C. H. Labor Cases, p. 70071, No. 63,448 (D. C., N. J., 1946).....	19
Mikczynski v. North American Aviation, Inc., 12 C. C. H. Labor Cases, p. 71185, No. 63,814 (D. C., S. D., Calif., 1947)	15
Newman v. Hi-Hat Elkhorn Mining Co., 11 C. C. H. Labor Cases, p. 69826, No. 63,358 (D. C., E. D., Ky., 1946).....	12
Orban v. Reynolds Metals Co., 11 C. C. H. Labor Cases, p. 69924, No. 63,395 (D. C., N. J., 1946).....	12
Payne v. Wright Aeronautical Corp., 162 F. (2d) 549.....	17
Payne v. Wright Aeronautical Corp. (D. C., N. J., 1946, un- reported)	19
Trailmobile Co. v. Whirls, 331 U. S. 40, 67 S. Ct. 982, 91 L. Ed. 939.....	12, 15, 19, 21, 23, 24

STATUTES.

Selective Training and Service Act of 1940 (54 Stat. 890), as amended (58 Stat. 799) (50 U. S. C. A. App., Sec. 301).....	1
Judicial Code, Sec. 128(a)-First (28 U. S. C. A. App., Sec. 225(a)-First)	2

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corporation,

Appellees.

**BRIEF OF APPELLEE LOCKHEED AIRCRAFT
CORPORATION.**

Statement of the Case.

The present action involves an adjudication of the seniority rights of Veterans James L. Campbell, Mitchell B. Joplin and Malcolm E. Kirk, petitioners and appellees herein under Sections 8(b) and 8(c) of the Selective Training and Service Act of 1940, 54 Stat. 890 (1940), as amended 58 Stat. 799 (1944) (50 U. S. C. A. App. Sec. 301, *et seq.*) and Section 7 of the Service Extension Act of 1941, as amended (50 U. S. C. A. App. Sec. 357). The jurisdiction of the District Court below is established by the provisions of Section 8(e) (50 U. S. C. A. App. Sec. 308(e)) of the former Act, and the jurisdiction here

rests on Judicial Code, Section 128(a)—First, 28 U. S. C. A. App. Sec. 225(a)—First.

The facts pertinent to the issues raised by this appeal are contained in the allegations of the original petition of these Veterans¹ [Tr. pp. 2-88] which are largely admitted by the answers of appellee Lockheed¹ [Tr. pp. 89-91] and appellant Union¹ [Tr. pp. 92-96] and the stipulation of facts submitted by the parties to the lower court. [Tr. pp. 97-107.]

It is not controverted that each of the Veterans was, prior to his entrance into the armed forces, employed by Lockheed, nor that each of the Veterans served honorably in the service of his country, received an honorable discharge and applied for reemployment and was reemployed by Lockheed in his former position—James L. Campbell on November 27, 1945; Mitchell B. Joplin on December 10, 1945; and Malcolm E. Kirk on March 7, 1946. It was further agreed in the stipulation, above referred to, that the seniority² of each of the Veterans with Lockheed

¹For purposes of convenience and in order to avoid any confusion in designating the various parties herein, the petitioners and appellees, James L. Campbell, Mitchell B. Joplin and Malcolm E. Kirk, will hereinafter be referred to as "the Veterans"; respondent and appellee, Lockheed Aircraft Corporation, will be referred to as "Lockheed"; and intervenor and appellant, Aeronautical Industrial District Lodge 727, will be referred to as "the Union."

²The collective bargaining agreement between Lockheed and the Union which was in effect at the time the Veterans entered the armed forces provided in Section 1 of Article III thereof that, "Six months after an employee is hired his seniority shall be retroactive to the date of his hiring. . . ." [Tr. p. 22.] Section 1 of Article IV of the collective bargaining agreement dated June 4, 1945, which was executed while the Veterans were serving in the armed forces, states, "Seniority shall be the relative status of employees in respect to length of service with the Company," [Tr. p. 58.]

is properly computed from the respective dates on which they were first employed by Lockheed, to wit: James L. Campbell, August 17, 1942; Mitchell B. Joplin, April 19, 1943; and Malcolm E. Kirk, August 5, 1942.

Within the period of a year following their reemployment, however, it became necessary for Lockheed to conduct a general layoff in the field and service mechanic occupation and in the course thereof Veterans Campbell and Kirk were laid off on June 21, 1946, and Veteran Joplin was laid off on June 24, 1946, although on each of said dates Lockheed retained in its active employ a non-veteran Union Chairman in the field and service mechanic occupation with less seniority than any of the Veterans. The retention of a non-veteran Union Chairman with less seniority than any one of the Veterans resulted from the application of the layoff procedure set forth in Sections 3(A) and 3(D), Article IV of the collective bargaining agreement dated June 4, 1945, (hereinafter for convenience referred to as the "1945 Agreement") [Tr. pp. 60-61] which procedure radically changed and modified, from a seniority standpoint, the layoff procedure set forth in the collective bargaining agreement in effect when the Veterans were inducted into the armed forces.

Sections 3(A) and 3(D) of Article IV of the 1945 Agreement provide as follows:

"(A) General Layoff Procedure. Layoffs shall be made in order of Company-wide seniority applied by occupation where ability, skill and efficiency are substantially equal. However, in the case of employees with four years' or more seniority, the Company may, in its discretion, retain them in order of their Company-wide seniority, regardless of occupation,

where ability, skill and efficiency are substantially equal. Any claim of unjust discrimination in the exercise of such discretion may be taken up as a grievance. Employees who have not acquired seniority rights may be laid off without regard to relative length of service.

“The word ‘occupation’ as used herein, includes all grades and leadmen within an occupation.”

“(D) Top Seniority for Union Chairmen for Purpose of Layoffs. For the purpose of applying the Temporary and General Layoff procedure, Union Chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain Chairmen. If the application of the General Layoff Procedure will result in the retention of more of such Chairmen in a group or department than are provided for in Article II, Section 2 of this Agreement, the Company shall prepare and furnish to the Union a list of all Chairmen in the locations where the surplus exists. The Union shall upon request of the Company promptly designate the Chairmen who are to remain in that capacity, and the Chairmen not to be retained as Chairmen shall be governed by the seniority rules applicable to the layoff of other employees. During a Temporary Layoff and during the period between the first and second steps in an Emergency Reduction of the Working Force, the terms of office of laid-off Union Chairmen shall be deemed to continue.” [Tr. pp. 60-61.]

Upon learning they had been laid off prior to the expiration of their first year of reemployment and that pursuant to the provisions of Section 3(D) of the 1945 Agreement, Lockheed had retained in its active employment a non-veteran Union Chairman with less seniority

in the field and service mechanic occupation, each of the Veterans complained to Lockheed through the United States Attorney that they had been denied their rights under the Selective Training and Service Act of 1940, as amended, and demanded that they be reinstated for the balance of their reemployment year and compensated for the time they had been laid off.

The Veterans' contention that their reemployment rights had been violated by their being laid off under these circumstances was predicated upon the premise, and it is not disputed by the parties hereto that if Lockheed had conducted the layoff in accordance with the terms of the collective bargaining agreement of September 15, 1941, (hereinafter for convenience referred to as the "1941 Agreement") [Tr. pp. 11-41] which was in effect between the Union and Lockheed at the time they had terminated their employment to enter the armed forces, the layoff would have been conducted primarily on the basis of seniority and that Lockheed could not, under the 1941 Agreement, have given preference in the layoff to a non-veteran Union Chairman with less seniority.³ It was further contended by the Veterans that Sections 3(A) and 3(D) of Article IV of the 1945 Agreement, which was executed by Lockheed and the Union subsequent to the Veterans' entrance into the armed forces and prior to their reemployment, deprived them of their reemployment rights under Sections 8(b) and 8(c) of the Selective Training and Service Act, as amended, and in turn vio-

³It is agreed by all parties to the within action that the knowledge, training, ability, skill and efficiency of each of the Veterans was substantially equal to that of the non-veteran Union Chairman retained and that each of the Veterans was capable of performing the work of said non-veteran Union Chairman. [Tr. p. 106.]

lated the terms of Section 6 of Article IV of the 1945 Agreement.⁴

Section 5 of Article IV of the 1941 Agreement, which was in effect at the time the Veterans entered the armed forces and which section defined the procedure to be followed in the event of a layoff, provided so far as pertinent hereto as follows:

“In case of a slack in production, layoffs are to be made primarily on the basis of the principle of seniority. Due consideration will be given, however, to (a) knowledge, training, ability, skill and efficiency, and (b) department record and other factors . . .” [Tr. pp. 27-28.]

These contentions advanced by the Veterans in demanding reinstatement and reimbursement for loss of wages during the period of their layoff placed upon Lockheed the burden of determining whether the provisions of Section 3(D) of the 1945 Agreement, granting Union Chairmen top seniority in the case of a general layoff regardless of their actual seniority, contravened the rights of the Veterans under Section 6, Article IV [Tr. p. 63], of that Agreement and, as well, the Selective Training and Service Act of 1940, as amended. The importance of the decision with which Lockheed was faced cannot be minimized for Lockheed had reemployed in excess of 6000 veterans during the preceding two years and was at that

⁴Section 6 of Article IV of the 1945 Agreement provided as follows: “Employees (other than temporary employees) who shall have left the employment of the Company for the purpose of entering the armed forces of the United States, shall be re-employed by the Company in accordance with the provisions of the Selective Training and Service Act of 1940, as such Act may be amended.” [Tr. p. 63.]

time faced with the necessity of making major reductions in its working forces. Lockheed's dilemma was therefore apparent for in the event it complied with the provisions of Section 3(D) of the 1945 Agreement and granted Union Chairmen top or "super seniority" when conducting its general layoffs, Lockheed would be faced with a possible action by each and every veteran laid off in an occupation in which a veteran or non-veteran, Union Chairman, with less seniority was retained, if the veteran entered the armed forces subsequent to the date of the 1941 Agreement and prior to the date of the 1945 Agreement, and had not completed his year of reemployment. Conversely, if Lockheed concurred in the position advanced by the Veterans, it subjected itself to possible grievances and actions by the Union for failure to comply with the 1945 Agreement. The reality of this dilemma is indicated by the present action and the intervention of the Union herein.

Lockheed eventually concluded, after carefully reviewing all available decisions and opinions on the question of a veteran's reemployment rights, that the Veterans herein were correct in their interpretation of the Selective Training and Service Act of 1940, as amended, and accordingly, recalled each of the Veterans herein and reinstated him in his respective position—James L. Campbell and Mitchell B. Joplin on July 15, 1946, and Malcolm E. Kirk on July 16, 1946. [Tr. p. 107.] Since that time Lockheed has consistently followed the policy of employing and retaining in their respective occupations for the full period of their reemployment year all veterans who are inducted

or enlisted in the military service while the 1941 Agreement was in effect when the occupational seniority rosters disclose that there is, in the veteran's occupation, a Union Chairman with less seniority than the veteran's. However, in order to avoid a possible double monetary liability which might result to Lockheed if it reimbursed the Veterans and its interpretation of the Act was determined to be incorrect, and it being well established that an employer may not file a declaratory relief action to secure an interpretation of this Act, Lockheed denied the claims of the Veterans for reimbursement for loss of wages they sustained during said layoff, and, as a result thereof, the present action was instituted. Upon the intervention of the Union in the action [Tr. pp. 92-96], the Union and the Veterans became the true parties of interest and Lockheed throughout the proceedings has taken the position that it is merely seeking a legal decision of the issues involved and would be governed by such a decision. Judgment was entered by the trial court in favor of the Veterans and against Lockheed, and the Union has filed this appeal.

The decision of the lower court is consistent with the policy followed by Lockheed since the reinstatement of the Veterans here involved, and Lockheed feels that such a decision is correct as a matter of law. In the light of these circumstances, although Lockheed has been named as an appellee, it deems its present duty in this appeal to be in reality that of *amicus curiae* and in this brief approaches the issues from such a standpoint.

SUMMARY OF ARGUMENT.

I.

Seniority Rights of the Veterans Exist Not Solely Because of Collective Bargaining Agreements but Primarily by Virtue of the Selective Training and Service Act.

II.

Section 3(D), Article IV of the 1945 Agreement Conflicts with and Detracts from the Statutory Seniority Rights of the Veterans and is Therefore Void as to the Veterans.

III.

Section 3(D), Article IV of the 1945 Agreement Discriminates against the Veterans and is Therefore Admittedly Void as to Them.

ARGUMENT.

I.

Seniority Rights of the Veterans Exist Not Solely Because of Collective Bargaining Agreements But Primarily by Virtue of the Selective Training and Service Act.

Any answer to the arguments advanced by the Union in its Opening Brief must necessarily be prefaced by a clarification of a contradiction appearing in the first two points of the Union's argument. In the first section of its argument (although entitled "ALL SENIORITY RIGHTS ARE BASED ON CONTRACTUAL RIGHTS ONLY") the Union states that seniority rights exist by virtue of contractual agreement *or statutes*. After thus properly stating the law with respect to the manner in which seniority rights are created, however, the Union, in complete disregard of its own proper statement of the law, concludes that "the only rights of the petitioners and appellees to seniority rights are predicated upon the collective bargaining agreement executed between the Union and Lockheed," and on such a conclusion predicates its following argument that the seniority rights of the veterans may be decreased or changed by the mere process of collective bargaining. To state that the veterans' seniority rights exist solely because of the collective bargaining agreements here involved, not only begs the very question at issue, but is obviously contrary to the very terms of those collective bargaining agreements and, as well, to establish canons of the law.

Realizing full well that the Selective Training and Service Act of 1940, as amended, guaranteed veterans certain seniority rights and that said rights were superior to, and superseded, any provisions of a collective bargaining agreement to the contrary, both the Union and Lock-

heed deemed it imperative that provision be made in their collective bargaining agreements to assure those rights to the veteran. Accordingly, in Section 6, Article IV of the 1945 Agreement the Union and Lockheed recognized specifically the statutory seniority rights (as well as any other rights granted by the Act) of the veterans and provided that in so far as those rights were concerned, the Act, and not the balance of the contract provisions, should govern. Said Section of the 1945 Agreement provides as follows:

“Employees (other than temporary employees) who shall have left the employment of the Company for the purpose of entering the armed forces of the United States, shall be re-employed by the Company in accordance with the provisions of the Selective Training and Service Act of 1940, as such Act may be amended.” [Tr. p. 63.]

Indeed, the seniority rights of veterans granted by the Act were recognized by the Union in the 1941 Agreement, for in Section 5, Article IV of said Agreement it is provided that an employee entering the military service

“shall be granted leave of absence covering the period of time in which he may be thus engaged in Government service without loss of seniority rights. Upon the termination of such Government service, if within forty-five (45) days⁵ such employees shall request re-employment and if the employees are physically and mentally able to do the work available, *the Company agrees to re-employ such persons in preference to all other persons in their occupations with less seniority.*” [Tr. pp. 27-28.] (Italics supplied.)

⁵The forty-five (45) day period within which the veteran must make application to be entitled to reemployment was by an amendment in 1944, 58 Stat. 798, extended to ninety (90) days.

Thus, by specific provisions of the very collective bargaining agreements upon which the Union predicates its case, it is established and agreed to by the Union that seniority rights of veterans exist not solely because of the terms of such agreements, but, as well, by reason of the provisions of the Selective Training and Service Act of 1940, as amended.

Furthermore, and even though said collective bargaining agreements had not, by their very terms, recognized the statutory guarantees afforded the veterans with respect to seniority rights, it is too well established to admit of question that said statutory guarantees would prevail notwithstanding the absence of such provisions from a collective bargaining agreement or the inclusion in such an agreement of provisions in conflict with the Act.

Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 963 (1946);

Trailmobile Co. v. Whirls, 331 U. S. 40, 67 S. Ct. 982, 91 L. Ed. 939 (1947);

Newman v. High-Hat Elkhorn Mining Co., 11 C. C. H. Labor Cases, p. 69826, No. 63,358 (D. C., E. D., Ky., 1946);

Orban v. Reynolds Metals Co., 11 C. C. H. Labor Cases, p. 69924, No. 63,395 (D. C., N. J., 1946).

Indeed, the very language of the *Fishgold* case, *supra*, quoted by the Union in a subsequent portion of its Opening Brief (p. 7) establishes beyond question the fact that certain rights of the veteran exist by reason of the Selective Training and Service Act of 1940, as amended, for at page 284, Justice Douglas states:

"These guarantees are contained in Section 8 of the Act and extend to a veteran, honorably discharged

and still qualified to perform the duties of his old position. (1) He has a stated period of time in which to apply for reemployment. 8(b). He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life. (2) He must be restored to his former position 'or to a position of like seniority, status, and pay.' 8 (b) (A) (B). *He is thus protected against receiving a job inferior to that which he had before entering the armed services.* (3) He shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence." (Italics supplied.)

It is submitted, therefore, that the very provisions of the collective bargaining agreements here in question, the decisions of our highest court and the admission of the Union contained in its Opening Brief establish beyond controversy that contrary to the contentions of the Union, seniority rights of veterans exist not merely by reason of collective bargaining agreements, but, as well, by virtue of the provisions of the Selective Training and Service Act of 1940, as amended, and that in the event of a conflict, the statutory rights must prevail. Accordingly, the decision on the issues presented by this appeal must turn upon a determination as to whether the provisions of the 1945 Agreement, and more particularly Section 3(D) thereof, conflict with, or detract from, the seniority rights guaranteed the Veterans by the Selective Training and Service Act of 1940, as amended.

II.

Section 3(D), Article IV of the 1945 Agreement Conflicts With and Detracts From the Statutory Seniority Rights of the Veterans and Is Therefore Void as to the Veterans.

The provisions of the Selective Training and Service Act of 1940, as amended, pertinent to the issue here involved, are as follows:

“Sec. 8(b) In the case of any person who, in order to perform such training and service (in the armed forces), has left or leaves a position, other than a temporary position in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position and (3) makes application for reemployment within ninety days * * * (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

“(c) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.”

The circumstances giving rise to the enactment of this legislation are only too fresh in the memory of this nation to here warrant any prolonged dissertation of the necessity for or purpose of this legislation. It is equally clear that Congress thereby intended to afford the veterans an “extraordinary statutory security” and that this legislation must be “liberally construed for the benefit of those who left private life to serve their country in its hour of great need.” (*Fishgold v. Sullivan Drydock Corporation, supra*, at page 285).

The very language of the Act makes it plain that the seniority rights of the veterans were uppermost in the minds of Congress when it legislatively extended this “extraordinary statutory security” to them. Thus, the Act provides that the veteran is entitled to be restored “to such position or to a position of like *seniority*, status and pay” (8(b)); and he “shall be so restored without loss of *seniority*” (8(c)). It is equally plain and requires no list of court decisions to establish that in the Act Congress used words which have acquired a meaning in industry and that the word “position” must be construed to mean not merely the physical job in question, but as well, all the incidences thereof, including seniority and the rights attributable to or arising out of that seniority (see: *Mikczynski v. North American Aviation Inc.*, 12 C. C. H. Labor Cases, p. 71185, No. 63,814 (D. C., S. D., Calif., 1947). As stated by the Supreme Court in *Trailmobile Co. v. Whirls, supra* (footnote 23, page 53):

“The position to which an employee must be restored is either the position previously held or ‘a position of like seniority, status, and pay’. See note 18. It is thus recognized that part of the restored ‘position’ is the seniority accrued prior to service in the

armed forces and under the *Fishgold* case, during service. '*Seniority*' is part of '*position*' and therefore, when the Act states in subsection (c) that the veteran may not be discharged '*from such position*' it means both from the job itself and from the seniority which is part of the job."

Since seniority and the rights attributable thereto are an integral part or incidence of the "position" to which the veteran must be restored, the intent of Congress with respect to seniority and seniority rights attributable thereto and the extent of the "extraordinary statutory security" afforded the veterans with respect to their seniority rights is made quite obvious by substituting the words "seniority rights" for the word "position" wherever the latter appears in that portion of the language of the Act with which we are here concerned. With such a substitution the Act would read:

"Sec. 8(b) In the case of any person who, in order to perform such training and service (in the armed forces), has left or leaves '*seniority rights*' * * * (B) if such '*seniority rights*' (were) in the employ of a private employer, such employer shall restore such person to *such* '*seniority rights*'

* * * * *

"8(c) Any person who is restored to '*seniority rights*' in accordance with the provisions of paragraph * * * (B) * * * shall not be discharged from *such* '*seniority rights*' without cause within one year after such restoration."

In the light of this outright edict of Congress as to the "extraordinary statutory security" to be enjoyed by the veteran, it is clear that in the instant case the seniority rights of the Veterans at the time of their application for

reemployment and throughout their reemployment year are those former seniority rights to which they were entitled at the time of their induction, including the right to insist, under Section 5, Article III of the 1941 Agreement that a general layoff be made primarily on the basis of seniority and not upon the basis of some artificial seniority such as that created by Section 3(D), Article IV of the 1945 Agreement in favor of Union Chairmen.

The Union has contended in its Opening Brief (pp. 6-10) that notwithstanding the unambiguous language of the Act and contrary to the statement of the Supreme Court that the veteran is afforded an "extraordinary statutory security" by the Act, the Veterans are bound, upon restoration to their former positions and during the year of their reemployment, by Section 3(D), Article IV of the 1945 Agreement executed during their absence in military service, which reduced their seniority rights and nullified their statutory seniority right security. Such a contention is based upon the theory that the only seniority rights afforded the veteran by the Act are those to which he would have been entitled had he remained continuously employed on the job during the period he served in the military service. In support of its contention, the Union relies upon the case of *Gauweiler v. Elastic Stop Nut Corp.*, 162 F. (2d) 448 (C. C. A. 3), and associated cases⁶ and attempts to secure additional justification there-

⁶On the same day the Third Circuit Court of Appeals reversed the District Court of New Jersey in the *Gauweiler* case, it similarly decided three other cases involving like questions, *viz.*, *Koury v. Elastic Stop Nut Corp.*, 162 F. (2d) 544; *DiMaggio v. Elastic Stop Nut Corp.*, 162 F. (2d) 546; and *Payne v. Wright Aeronautical Corp.*, 162 F. (2d) 549. For purposes of convenience, all four of these cases will hereafter collectively be referred to as the *Gauweiler* cases.

for by segregating certain language from the context of the decision of the Supreme Court in the *Fishgold* case.

It is submitted that the *Gauweiler* cases are distinguishable upon their facts from the instant case; first, because there is no evidence in those cases that the collective bargaining agreements there considered specifically recognized the statutory seniority rights of the veterans as is here the case (see Section 5, Article IV of the 1941 Agreement [Tr. pp. 27-28] and Section 6, Article IV of the 1945 Agreement [Tr. p. 63]); and secondly, because it was established in the *Gauweiler* cases that "there was an utter impracticability of enforcing in the same plant two conflicting systems of seniority", whereas, in the instant case it was orally stipulated in the lower court:

"That in the operation of the business of Lockheed, the defendant corporation has operated, first under the policy of complying with the contract granting Union Chairmen top seniority and applying that provision to veterans returning from the service; that, secondly, Lockheed has operated under the policy of employing and retaining in their employment veterans, and not considering that the provision of the contract giving Union Chairmen top seniority as binding upon those veterans and that the application of either policy has not proved inconvenient to the company" [Tr. pp. 125-126].

However, it is believed that even if the majority opinions in the *Gauweiler* cases are deemed to be predicated upon facts which are on all fours with those in this litigation established, such opinions are in direct conflict with the language of the Act and the interpretation placed thereon by the Supreme Court in the *Fishgold* and *Trailmobile* cases. In this connection it is interesting to note that the

lower court herein orally ruled in favor of the Veterans [Tr. pp. 117-120] on the basis of the *Trailmobile* case and the District Court decisions in the *Gauweiler* cases, which latter cases held void as to veterans a collective bargaining agreement, executed while the veterans were in the military service, containing a "top seniority" provision for Union Chairmen similar to that set forth in Section 3(D), Article IV of the 1945 Agreement. (See: *Gauweiler v. Elastic Stop Nut Corp.*, 69 Fed. Supp. 294 (D. C., N. J., 1946); *DiMaggio v. Elastic Stop Nut Corp.*, 11 C. C. H. Labor Cases p. 70072, No. 63,449 (D. C. N. J., 1946); *Koury v. Elastic Stop Nut Corp.*, 11 C. C. H. Labor Cases p. 70071, No. 63,448 (D. C., N. J., 1946); and *Payne v. Wright Aeronautical Corp.* (D. C., N. J., 1946, unreported).) Prior to the preparation and signing of the formal findings and judgment in the instant case, however, the Third Circuit Court of Appeals reversed the *Gauweiler* cases and upon a motion of the Union [Tr. pp. 108-110] the District Court reopened this matter for further argument. After hearing said reargument, however, and notwithstanding the opinions of the Third Circuit Court of Appeals in the *Gauweiler* cases, the District Court on the basis of the *Trailmobile* case reaffirmed its oral opinion formerly given, and awarded judgment in favor of the Veterans. Thus, before arriving at its decision in this case, the Court below had before it the only cases relied upon by the Union in its Opening Brief, and concluded that the *Gauweiler* cases were contrary to the intent of the Act as expressed by the Supreme Court in the *Trailmobile* case.

It is submitted that a careful analysis of the *Fishgold* and *Trailmobile* cases will establish the wisdom and validity of the judgment of the lower court.

The *Fishgold* case involved the sole question as to whether the Act afforded a veteran seeking reemployment a "super-seniority" which entitled him to reemployment preference over a non-veteran regardless of their respective actual seniorities. In other words, the court was asked to determine whether the Act granted the veteran a step-up or gain in seniority over that he had at the time he entered the armed forces. Both the Circuit Court of Appeals for the Second Circuit and the Supreme Court ruled that such was not the proper interpretation of the Act, and in their respective decisions appears certain language (quoted by the Union in its Opening Brief at pp. 7-9) which when removed from the context of those opinions would appear to sustain the Union's contentions in this litigation. However, when considered in the light of the sole issue before the Court, such language assumes a meaning completely foreign to the meaning attributed to it by the Union. Thus, when the Supreme Court states at page 286:

"No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

and again when stating at page 288:

"Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system.

What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year,”

it is submitted that the Court has reference to the *seniority system in effect at the time* he entered the military service, and the Court is in effect stating that the Act did not create in favor of the veteran a seniority superior to that which he enjoyed under that system. And further when the Court states, “Thus, he does not step back on the seniority escalator at the point he stepped off. He steps back on the precise point he would have occupied had he kept his position continuously during the War”, the Court is merely reaffirming the fact that the veteran is entitled to have credited to his *seniority* an amount of time equal to that which he spent in the military service. It seems only reasonable to assume that had the Supreme Court intended by the above-quoted language to rule, as the Union contends, that the veteran must, upon his reemployment, be governed by the seniority system in effect upon his return, the Court would have specifically so stated. At best, therefore, the language cited by the Union in support of its contention is, in view of the issue here before the Court, subject to the interpretation that the veteran must be restored to his former seniority rights; whereas, there is in the *Fishgold* and *Trailmobile* decisions language which unquestionably indicates that the Circuit Courts and the Supreme Court consider the Act as prohibiting the reduction of a veteran’s seniority by the establishing of a new seniority system while the veteran is in the armed forces, and further establishes that the Union’s interpretation of the above-quoted language is erroneous.

In the well-considered opinion of the Second Circuit Court in the *Fishgold* case, 154 F. (2d) 785, Judge Learned Hand completely answers the argument that the Act grants the veteran only those rights he would have had if he had remained on the job, for he states at page 788:

“As subsection B reads, it would probably be understood to restore the veteran only to that same position which he held when he was inducted. That was, however, thought to be unfair; for while he was in service, there were likely to be such changes in the personnel that when he came back, he might find himself junior to those over whom he had had priority when he left. To remedy this, by an amendment made while the bill was in Congress, he was given the same status that he would have had, if he had been ‘on furlough or leave of absence’ while he was in the service. *How far that differed from his position had he remained actually at work, does not appear; but clearly the amendment presupposed that a difference there might be.*”

And again, at page 788, in indicating that the veteran, upon his reemployment, was entitled to something more seniority-wise than he would have received had he remained in his position during the time he was in military service, Judge Hand states:

“It seems to us that Congress used ‘discharge’ in this sense: *i. e.*, that the veteran was to be assured of his job for the same period—a year—for which he was to be drafted; *but that the job to which he was ‘restored’—as that very word implies—was to be subject to the same conditions to which the old job had been subject, with only the exception that it should be better in so far as a leave of absence for the year might improve it.*”

And in affirming the judgment of the Second Circuit Court of Appeals in the *Fishgold* case, the Supreme Court, in unequivocal language stated at page 285:

“*And no practice of employers or agreements between employers and union can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permit.*”

Finally, if any questions remained as to the proper meaning to be attributed to the language of the Supreme Court in the *Fishgold* case, its own review of that opinion in *Trailmobile Co. v. Whirls, supra*, removes any doubt as to that meaning. In the *Trailmobile* case, the veteran's seniority rights had been drastically reduced by a collective bargaining agreement setting up a different seniority system but the agreement was not executed until subsequent to the expiration of the veteran's reemployment year. In the course of its ruling that the Act did not protect for more than a year the veteran's seniority under the seniority system established by the agreement in effect at the time of his induction, the Supreme Court reviewed its former opinion in the *Fishgold* case and stated at page 58:

“The Court held, indeed, that the Act did not give him standing to outrank nonveteran employees who had more than the amount of seniority to which he was entitled to be and had been restored; in other words, that he was not given so-called ‘superseniority’. But it also squarely held that he was given security not only against complete discharge, but also against demotion, for the statutory year. And demotion was held to mean impairment of ‘other rights’, including

his restored statutory seniority for that year. 'If within the statutory period, he is demoted, his status, which the Act was designed to protect, has been affected and the old employment relationship has been changed. He would then lose his old position and acquire an inferior one. He would within the meaning of §8(c) be "discharged from such position".' 328 U. S. at 286.

"That §8(c) applies to secure the protection of 'other rights' for at least the statutory year was therefore inherent in the rationalization of the *Fishgold* decision. To that extent at any rate the concluding clause was held applicable, not severable, concerning them. * * * While the reemployed veteran did not acquire 'superseniority', §8(c) gave him the restored standing for the minimum duration of the prescribed year.

"It is therefore clear that Congress did not confer the rights given as incidents of the restoration simply to leave the employer free to nullify them at will, once he had made it."

And once again, in the *Trailmobile* opinion the Supreme Court reiterated (page 58):

"For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining or of the employer's administration of general business policy."

It is submitted therefore that not only does the plain and unequivocal language of the Act itself, but as well, the interpretation of that language by the Supreme Court, establish that the "extraordinary statutory security" guaranteed the veteran by that Act includes the assurance that the veteran shall be entitled, at a minimum, to those

seniority rights which he enjoyed at the time of his induction. It follows therefore that Section 3(D), Article IV of the 1945 Agreement, which admittedly conflicts with and decreases those seniority rights, is void as to the Veterans here involved.

But not only does the Union rely upon a forced construction of the language in the *Fishgold* case. In order to conclude that the Veterans are bound by Section 3(D), Article IV of the 1945 Agreement, the Union assumes that had the Veterans remained in their positions during the time they served in the armed forces, the 1945 Agreement would have been written in identical terms. Had the three Veterans here involved been the only employees of Lockheed who entered the armed forces during the years 1941-1945, such an assumption might be warranted. However, the speculative nature of such an assumption becomes obvious when considered in the light of the vast number of Lockheed employees (in excess of 25,000) who entered the armed forces during that four-year period. As stated by Judge McLaughlin in his earnest and well-reasoned dissenting opinion in the *Gauweiler* case (p. 454):

“Statements as to what Gauweiler’s (the veteran) seniority rights would have been had he remained in his employment cannot be other than futile speculation and are in any event irrelevant, for the statute and the cases construing it tell us not what Gauweiler’s status might have been if he had continued his civilian occupation but what he was entitled to as a returned veteran.”

III.

Section 3(D), Article IV of the 1945 Agreement Discriminates Against the Veterans and Is Therefore Admittedly Void as to Them.

It is admitted by the Union, and clearly stated in the majority opinions in the *Gauweiler* cases, that provisions in a collective bargaining agreement, executed while the veterans were serving in the armed forces, which discriminated against them would not be binding upon the veterans. There can be no question but that Section 3(D), Article IV of the 1945 Agreement discriminated in favor of the Union Chairmen, for that was obviously the very purpose of that provision. However, it is contended by the Union that since Section 3(D), Article IV of the 1945 Agreement is applicable to veterans and non-veterans alike, the discrimination in favor of the Union Chairmen does not discriminate against the veterans.

An examination of the 1945 Agreement and more particularly Section 2, Article II thereof, describing the method of selection of Union Chairmen, discloses a factual discrimination against the Veterans, for by reason of their absence in the military service at the time of the selection of persons who were serving as Union Chairmen upon the Veterans' return, it is obvious that they had no opportunity to be appointed as a Senior Chairman or to vote for their Group Chairman.

Furthermore, the argument that Section 3(D), Article IV of the 1945 Agreement is not discriminatory as to the Veterans because that Section is applicable to veterans and non-veterans alike, ignores the fact that the Act granted the Veterans an "extraordinary statutory security", and that the application of Section 3(D), Article IV of the 1945 Agreement to the Veterans results in

their loss, not only of the rights under the 1941 Agreement they had in common with non-veterans, but as well, in their loss of their "extraordinary statutory security." To assure that Lockheed veterans, upon their reemployment, would not lose the benefits of this security, by reason of the balance of the provisions of the 1945 Agreement which might otherwise be discriminatory as to the veterans, both the Union and Lockheed agreed upon the incorporation of Section 6, Article IV into that Agreement.

Conclusion.

It is submitted that the judgment of the lower court should be affirmed and that a contrary action by this Court would be paramount to a ruling that the "extraordinary statutory security" afforded the Veterans by the Act could be nullified by collective bargaining agreements—a ruling which would be contrary to the legislative dictates of Congress and the unambiguous opinions of the Supreme Court.

Respectfully submitted,

ROGER B. SMITH,

ROBERT H. CANAN,

MARK E. TRUE,

Attorneys for Appellee Lockheed Aircraft Corporation.

No. 11750

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, an un-
incorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM E.
KIRK and LOCKHEED AIRCRAFT CORPORATION, a corp-
oration,

Appellees,

APPELLANT'S REPLY BRIEF.

FILED

APR 2 2 1948

PAUL P. O'BRIEN,
CLERK

HINDIN, WEISS AND GIRARD,
111 West Seventh Street, Los Angeles 14,
*Attorneys for Appellant, Aeronautical Industrial
District Lodge 727.*

TOPICAL INDEX

PAGE

I.

The law as announced by the Third Circuit Court of Appeals in the majority opinion of the <i>Gauweiler v. Elastic Stop Nut Corp.</i> , should be followed by this court.....	1
--	---

II.

The provisions of the 1945 Collective Bargaining Agreement do not discriminate between veterans and non-veterans, nor against veterans as such.....	9
---	---

III.

Selective Training and Service Act provisions gave legal recognition to the seniority systems in effect in private industry but did not enlarge upon nor create positions of seniority which did not already exist by contract.....	12
Conclusion	13

namely *Koury v. Elastic Stop Nut Corp.*, 162 F. (2d) 544; *DiMaggio v. Elastic Stop Nut Corp.*, 162 F. (2d) 546 and *Payne v. Wright Aeronautical Corp.*, 162 F. (2d) 549. As has been previously pointed out, these cases represent square authority for the questions of law presented by this appeal. The other line of authorities relied on by the respondents herein, are represented by the District Court decisions of these same cases. This Court on appeal is called upon either to adopt the law as was announced by the Circuit Court of Appeals in the foregoing cases, or to reject the law as so announced by that Circuit Court of Appeals.

While it must be conceded that one Circuit Court of Appeals is not bound to follow the law as is announced by the Circuit Court of another Circuit, nevertheless the opinion of a Circuit Court of Appeals represents the highest form of precedent and authority and should be highly persuasive, and in the interests of uniform administration of the law, this Court should give due weight and consideration to the opinion of another Circuit which has considered and passed upon the same legal questions.

The respondent appellees have, in their brief, urged among other grounds why this Court should reject the interpretation of the law as expressed by the justices of the Third Circuit Court of Appeals, that the Court consider the number of District and Circuit Court judges who took a different view from the opinions expressed by the majority opinion of the Third Circuit Court of Appeals. The appellant knows of no precedent for such a basis of attack upon the opinion of a Circuit Court judgment, and the appellant respectfully urges that the law as expressed by the Circuit Court of Appeals is nonetheless valid and is nonetheless strong authority

notwithstanding the fact that a number of different lower courts Judges have assumed a different interpretation of the law.

Likewise, the two expressions of the Supreme Court on the subject of veterans reemployment rights cannot be considered as anything but *obiter dicta* with reference to the matters before this Court in this case. The Supreme Court in the two cases it did decide (*Fishgold* case and *Trailmobile* case) did not have before it the issues of fact and law which were presented in the *Gauweiler* case nor in the present case. So far as the appellant has been able to ascertain, no appeal has been made to the Supreme Court from the *Gauweiler* case or its companion cases.

The petitioner appellees seek to distinguish the case on appeal from the *Gauweiler*, *Koury*, *DiMaggio* and *Payne* cases on the facts. The facts do not bear out their contention of a distinction on the facts. A statement of the facts of the *Gauweiler* case as given in the opinion of the Circuit Court by Chief Justice Goodrich negatives any basis for differentiation between that case and the present case. Justice Goodrich in that case summarized the facts and questions as follows:

“A man is employed by a corporate employer. His employment is interrupted by his call for service in the armed forces. He qualifies and is inducted into the army. During his absence a new contract is negotiated by the employer and the union which is the authorized bargaining agent for the employees in the plant. Under the terms of the new agreement, the seniority provisions which existed earlier are modified so that certain union officials become entitled to higher seniority than anyone else. In the course of time our employee returns from his

tively. Upon their reemployment, a lay-off occurs. If the opinion of the District Court in this case is now followed through, Veteran A's place on the seniority list would be ahead of the union chairmen whose top seniority was created by the new contract, but Veteran B, inducted one day later, would find himself in a seniority position inferior to that of the union chairmen since the new contract, giving top seniority to union chairmen, was in effect the day that he was inducted, and his seniority rights are to be governed by the contract in effect at the time of his induction.

The stipulation urged so strongly by the petitioner appellees as grounds for distinguishing this case from the *Gauweiler* case [Rep. Tr. pp. 125-126], to the effect that Lockheed Aircraft Corporation first operated under one seniority policy and then operated under the other seniority policy, and that "the application of either policy has not proved inconvenient to the company" is very different from the situation hereinabove presented. It is one thing to uniformly treat all employees, veterans and non-veterans, alike under one contract or under the other contract. It is a highly different situation to operate under both contracts simultaneously, concurrently and with one set of veterans enjoying seniority rights under one contract and another set of veterans enjoying seniority rights under another contract. This is undoubtedly one of the very situations which the Court considered as impractical under the *Payne* and *DiMaggio* cases. Rather than distinguishing the case at bar from the impractical

situation referred to in the majority opinions in the *Payne* and *DiMaggio* cases, the case at bar emphasizes the utter impossibility and impracticability of allowing two sets of seniority rights to exist side by side as would be the case here. Lockheed Aircraft Corporation at no time was forced to, nor did it, grant some veterans seniority under the old contract, and at the same time grant other veterans seniority rights under the new contract, and it is doubtful that the respondent Lockheed Aircraft Corporation could effectively do so even if it tried. Yet this very result would follow if the District Court judgment were upheld in the case at bar. Some veterans would enjoy seniority rights under one contract while a fellow veteran would have his seniority based on a later contract. Such a result was not contemplated by the law.

Likewise, the second claimed basis of distinction between the case at bar and the *Gauweiler* case as indicated (b) above, namely that the contract of 1945 in the case at bar made specific reference to the Selective Training and Service Act, while the *Gauweiler* case and the companion cases are silent as to a similar provision in their contract, is likewise not a valid point of distinction. The 1945 agreement provided in Section 6 of Article IV that:

“Employees (other than temporary employees) who shall have left the employment of the company for the purpose of entering the armed forces of the United States shall be reemployed with the company in accordance with the Selective Training and Service Act of 1940 as such Act may be amended.”

Such contractual provision added nothing to the contract with reference to employees seniority rights. The company was bound to reemploy veterans in accordance with the Selective Training and Service Act of 1940 whether the contract provided for the reemployment or not. The contractual provision in question did not affect the seniority rights of any of the employees, and the provision in question did not change, add or detract from the rights of the parties hereto. The Selective Training and Service Act of 1940 was in effect at the time of the making of the Collective Bargaining Agents herein involved, and the provisions of the Act are as equally effective whether they were specifically referred to in the Agreement or not. Appellant has no quarrel with the statement of the law as enunciated by the appellees as follows:

“Laws which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. . . . This principle embraces alike those which affect its validity, construction, discharge or enforcement.”

Farmers & M. Bank v. Fed. Res. Bank, 262 U. S. 649, 660; 43 S. Ct. 651; 67 L. Ed. 1157, 1164.

It would appear therefor that the inclusion of Section 6, Article IV to the 1945 agreement added nothing to the rights of the parties hereto and is not a valid basis for claiming any factual distinction between the contractual provisions in the case at bar from the contractual provisions discussed in the *Gauweiler* case.

II.

The Provisions of the 1945 Collective Bargaining Agreement Do Not Discriminate Between Veterans and Non-Veterans, Nor Against Veterans as Such.

Notwithstanding the appellees' contention that the 1945 Collective Bargaining Agreement discriminated against veterans, no such discrimination exists in fact or in law. The appellee, Lockheed Aircraft Corporation asserts that the 1945 agreement is discriminatory against veterans because such employees would have had no opportunity to be appointed as Union chairmen, or vote for their group chairmen, while they were in the armed forces. Such an argument is without merit. At all times during their period in the armed services, the petitioner appellees were members of the appellant union and had all of the opportunities to vote for their group chairman had they so desired. This is equally true after they returned to the job after their military service. No facts were presented to the trial court and none were covered by any Stipulation with reference to whether or not the petitioner appellees could or could not have voted for their group chairmen or whether or not they had any opportunity to be appointed as a senior chairman, and it is not proper for this Court on appeal to speculate as to these matters. These matters are irrelevant and immaterial to the basic problem of law presented to the Court. The 1945 contract applied equally to all employees of Lockheed Aircraft Corporation. This was true whether they were veterans or non-veterans. The factual situation of discrimination referred to in the *Gauweiler* case is not present in fact in the case at bar.

Likewise, no discrimination within the meaning of the *Gauweiler* case exists by reason of creating top seniority by contract for certain union officials. It is not unusual in labor contracts to provide that certain employees shall head the seniority lists. One reason for this provision is the desirability of maintaining a union representative at work at all times to represent the interests of the members and to prevent an employer unfriendly to the union from discharging everyone on the seniority list up to and including the last union member employee. With reference to this type of contractual provision, Chief Justice Goodrich in the *Gauweiler* case declared as follows:

“In entering into labor contracts, the bargainers must make their agreements with a view to the rights of the entire group bound by them and not enter into agreements which discriminate against one part for the benefit of another. The provision for top or preferred seniority for union officers and other officials is neither uncommon nor arbitrary. It may add a pleasant emolument to a particular union office, but it also provides what union members may well consider a highly essential need; that is, to have their own representatives on the job to look after their interests so long as work is being done in the plant.”

The petitioner appellees as members of the appellant union, would undoubtedly agree that union security as is provided for by such a provision is beneficial both to the union and to themselves as members of the union.

The interpretation of the Selective Training and Service Act as announced in the decision of the trial court in effect gives to veterans a form of “super-seniority.” The doctrine of “super-seniority” has been repudiated by the United States Supreme Court in the *Fishgold* case. The

criterion for testing the rights of a returning veteran is, we feel, an examination of the rights of the employee who stayed on the job at the war plant and rendered service to his country in that way. Thus, the veteran must not be required to lose any of the rights which he would have had had he stayed at home. The Supreme Court in the *Fishgold* case declared as follows:

“We would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services.”

The same union was certified as the bargaining agent for the petitioner appellees before their induction as after their induction. The same union as their collective bargaining agent negotiated the first contract as well as negotiated the second contract. Had the petitioner appellees been inducted into the armed services one day after the new contract had become effective rather than a short time before, there would be no question but what they would be bound by the terms of the collective bargaining agreement. After June 4, 1945, the seniority rights of all of the employees who remained on the job, and all of the veterans who were inducted thereafter into the armed services, were determined by the terms of the new contract. The petitioner appellees were restored to their position and enjoyed during the period of their reemployment all of the benefits which the new contract conferred upon the employees. If the test is as we think the Supreme Court has declared it to be, and as we know the Third Circuit Court has declared it to be in the *Gauweiler* case, the petitioner appellees should be bound by the terms of the new contract just as they would have been had they been continuously on the job at home rather than in the

armed forces. They would have enjoyed all the rights of their stay-at-home brethren by applying the terms of the new contract. To give them more rights or higher seniority than the man who stayed at the plant is to give them a super-seniority. This theory of "super-seniority" the Supreme Court rejected in the *Fishgold* case.

III.

Selective Training and Service Act Provisions Gave Legal Recognition to the Seniority Systems in Effect in Private Industry but Did Not Enlarge Upon Nor Create Positions of Seniority Which Did Not Already Exist by Contract.

A reading of the Selective Training and Service Act reveals that the Act seeks to protect the veteran in preserving and restoring to him those seniority rights which he had by reason of an existing contract. The act did not give the veteran any seniority whatsoever (save the right to be reemployed) if he did not already have seniority rights by virtue of an existing contract or an existing statute. The Act did not give John Doe any seniority rights as we know seniority rights to be, if John Doe was so unfortunate as to be employed by an employer who had no contractual agreement to give his employee any seniority rights. Seniority rights as the term is here used, refers only to the right of an employee to have preferences over other employees by reason of longer service with the company.

In the case at bar, the petitioner appellees would have had no rights to seniority, had there been no contract

between the union and the employer which created those rights. Employment in and of itself gives no rights of seniority to an employee. *Elder v. N. Y. Central Railway*, 152 F. (2d) 361. Selective Training and Service Act, thus said in effect, in those places of employment where there is existing seniority privileges recognized by contract, the veteran is entitled to them. In other words, he is given protection in his contractual rights, by force of the law. But the Act does not say, nor can it seriously be contended that it says, that an employee in a plant without any contractual provisions for employee seniority rights has any job seniority rights, as the term is herein used, by reason of the act itself. If such were the case, just what seniority rights would the employee in a plant without a contract have? Such a result cannot seriously be claimed.

Conclusion.

The sole question for decision on the appeal is whether or not the seniority rights of a returning veteran are to be determined by the contract which was in effect on the day of the induction of the veteran, or do the seniority rights provided for in a subsequent contract in effect at the time of the reemployment and lay-off of the veteran control. It is respectfully submitted that a Court of the highest authority has determined as a matter of law that the seniority rights of the veteran are determined by applying the test—what would the veteran's seniority rights have been had he been "either continuously on the job in the plant or away on furlough or

leave of absence for some personal reason.” Appellant respectfully urges that no adequate reason has been shown why the doctrine of the *Gauweiler* case should not be declared to be the applicable law of this case, nor have any facts been shown to distinguish or differentiate the case at bar from the *Gauweiler* case.

Appellant respectfully urges that the judgment of the District Court in the case at bar be reversed.

Respectfully submitted,

HINDIN, WEISS AND GIRARD,

By MAURICE J. HINDIN,

*Attorneys for Appellant, Aeronautical Industrial
District Lodge 727.*

